Supreme Court, U. S.
FILED
DEC 13 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. , MISC. 76-803 .

VESCO & CO., INC.,

Petitioner,

vs.

INTERNATIONAL CONTROLS CORP.,

Respondent.

Motion for Leave to File Petition for Common Law Writ of Certiorari or Mandamus and Petition for Common Law Writ of Certiorari or Mandamus

ALBERT G. BESSER,
HANNOCH, WEISMAN, STERN & BESSER,
Counsel for Petitioner,
Vesco & Co., Inc.,
744 Broad Street,
Newark, New Jersey 07102

JAMES J. SHRAGER
DEAN A. GAVER
ROBERT C. EPSTEIN
On the Petition

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

TABLE OF CONTENTS

TABLE OF CONTENTS

CASES CITED:

TABLE OF CONTENTS

CASES CITED:

TABLE OF CONTENTS

TABLE OF CONTENTS

APPENDIX

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. , Misc.

VESCO & CO., INC.,
Petitioner,

vs.

INTERNATIONAL CONTROLS CORP.,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR COMMON LAW WRIT OF CERTIORARI OR MANDAMUS

Petitioner respectfully moves this Court for leave to file the petition for issuance of a common law writ of certiorari or, in the alternative, for the issuance of a writ of mandamus, hereto annexed, under Section 1651 of Title 28 of the United States Code, directed to the United States Court of Appeals for the Second Circuit, and the Honorable Robert P. Anderson, Honorable Walter R. Mansfield, and the Honorable William H. Mulligan, Judges of the United States Court of Appeals for the Second Circuit.

ALBERT G. BESSER
Counsel for Petitioner

HANNOCH, WEISMAN,
STERN & BESSER
744 Broad Street
Newark, New Jersey 07102

SUPREME COURT OF THE UNITED STATES

October Term 1976

VESCO & CO., INC.,

Petitioner,

vs.

INTERNATIONAL CONTROLS CORP.,

Respondent.

PETITION FOR A COMMON LAW WRIT OF CERTIORARI OR, ALTERNATIVELY, A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Vesco & Co., Inc. respectfully prays that a common law writ of certiorari be granted or, alternatively, that a writ of mandamus be issued to review the order of the United States Court of Appeals for the Second Circuit, entered in this cause on September 14, 1976.

OPINIONS BELOW

The orders of the United States Court of Appeals for the Second Circuit, dated September 14, 1976, appear at (1a) of the appendix hereto. The decision and order of the Second Circuit dated May 13, 1976, appear at (3a) of the appendix hereto. The amended judgment of the United States District Court for the Southern District of New York, Judge Charles E. Stewart, Jr., presiding, dated May 26, 1976, also appears in the appendix, commencing at (16a).

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on September 14, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1651(a). The Second Circuit having declined to exercise jurisdiction upon petitioner's motion, the relief sought is not available in any other court and cannot be had through any other appellate processes.

QUESTIONS PRESENTED FOR REVIEW

1. In denying petitioner's motion to reassume jurisdiction of issues undecided in a prior appeal, has the Court of Appeals treated petitioner unfairly, when the effect of such denial is to subject petitioner to massive judgments while simultaneously foreclosing it from contesting the merits of those judgments?

2. Are petitioner's due process rights vitiated by permitting execution against it on default judgments entered against an individual found to be its *alter ego*, where fundamental due process issues, crucial to the validity of the default judgments, remain unheard?

STATUTES AND REGULATIONS INVOLVED

This is an action based upon alleged violations of the Securities Exchange Act of 1934 (15 U.S.C. §78aa *et. seq.*) and *Rule* 10b-5 (17 C.F.R. §240.10b-5) of the Securities and Exchange Commission, which is promulgated pursuant to the authorization contained in Section 10b of the 1934 Act [15 U.S.C. §78j(b)]. Jurisdiction is asserted by respondent based upon Section 27 of the 1934 Act (15 U.S.C. §78aa).

STATEMENT OF THE CASE

1. *Basis for federal jurisdiction and the institution of the action*

Respondent, International Controls Corp. (hereinafter referred to as "ICC"), instituted this action on June 7, 1973. The complaint generally alleged that many of the named defendants, although not the petitioner, Vesco & Co., Inc. (hereinafter referred to as the "Company"), did by means of interstate commerce and the national securities exchanges, defraud respondent and its stockholders in violation of the Securities Exchange Act of 1935 (15 U.S.C. §78aa). This alleged violation of the securities laws is the sole basis for federal jurisdiction in this case.

2. *Prior proceedings*

On June 7, 1973, ICC filed a complaint against many defendants alleging numerous violations of the federal securities law, as well as other common law wrongs (73 Civ. 2518). The allegations centered around two general series of events, to wit:

> (1) certain transactions by those designated in the complaint as "Vesco and his group" and other alleged aiders and abettors regarding assets and funds of I.O.S. and other related companies; and
>
> (2) certain other transactions by the same persons involving a Boeing 707 airplane.

Preliminary injunctive relief was secured by ICC, and the Company and other defendants filed motions challenging such relief, jurisdiction, and the sufficiency of the pleadings. See *ICC v. Vesco*, 490 F.2d 1334 (2 Cir. 1974). A petition for certiorari, filed by petitioner, was sub-

sequently denied by this Court. During the course of those proceedings, it was made clear that ICC would attempt to enforce against the Company any judgment it secured against Robert L. Vesco, and, at all stages, the Company sought to preserve its rights to be heard on the merits of any claims which ultimately would result in an attack on its assets.

On October 5, 1973, a default on the complaint was entered against Robert L. Vesco, individually (hereinafter referred to as "Vesco"), which was eventually followed by a partial inquest, setting partial damages at $2,422,466.72. However, prior to the inquest, and prior to the entry of default, plaintiff filed an amended complaint adding new causes of action (some of them against Vesco) and joining additional defendants. The inquest purported to determine damages based upon the complaint which no longer existed, having been superseded by the amended complaint. There has been no finding that the amended complaint has ever been served upon Vesco (although an affidavit of service *was* filed by ICC), and no default upon the amended complaint has ever been entered with respect to him.

On April 8, 1974, ICC filed a complaint against Robert L. Vesco in another action (74 Civ. 1588). Again, a default was entered against Vesco, and the Company (not a named party therein) sought to intervene to be heard on the issues of liability and damages. The trial court (also Judge Stewart) denied intervention, assuring counsel that the Company would have its opportunity to be heard if ICC sought to satisfy its judgment against Vesco out of assets of the Company. The Company's appeal to the Second Circuit of the denial of the intervention motion was denied, based, at least in part, upon the

trial court's assurance that the Company would have its opportunity to be heard.

3. *The District Court proceedings*

On May 20, 1975, ICC secured an order to show cause, in effect seeking to enforce both of its default judgments against Vesco by securing assets of the Company. The Company responded by seeking a hearing on the underlying claims against Vesco, both as to liability and damages, and otherwise challenging the appropriateness of executing upon the judgment at that time. The court, apparently reversing its prior stated position that the Company would have the opportunity to be heard on the merits of the judgment sought to be enforced, denied the Company's applications and ordered a hearing *only* on the issues of whether the Company was the *alter ego* of Vesco or whether fraudulent conveyances had been made.

The Company is a Delaware corporation formed on July 12, 1972, as a result of estate planning begun in late 1967 or early 1968, by counsel for the Vesco family along with its accountants. The ultimate creation of the Company was occasioned by tax rulings received on or about April 26, 1972 and July 21, 1972.

In the months of July through December of 1972, therefore, Vesco exchanged 800,000 shares of ICC common stock owned by him (having a value of $2,500,000) to the Company in return for all of the preferred stock of the Company and a portion of the voting common stock. The preferred stock carried with it a liquidating preference equal to the same $2,500,000.

In addition, 46,380 shares of ICC common stock beneficially owned by the Vesco children since 1966, were ex-

changed for a minority of the voting common stock and all of the nonvoting common stock of the Company.

One of the purposes and effect of the transfer was to put an upper limit on the value of Vesco's ICC holdings, for estate tax purposes, at the par value of the preferred stock (*i.e.* the appraised fair market value of that stock at the date of the exchanges), thereby permitting all future appreciation of that stock to inure to the benefit of the nonvoting common shareholders—the Vesco children—and to pass to them free of any estate tax.

Assets of the Company consist almost entirely of ICC stock. The Company's stock, in turn, is presently owned as follows: The preferred stock is held by Vesco; 75% of the common stock—the only voting stock—is owned by Patricia J. Vesco as custodian for Anthony, Dawn, and Robert, three of her children under the age of twenty-one. The balance is owned by Daniel Vesco who has passed the age of 21.

The *alter ego* hearing was held on June 20, 1975. By memorandum decision dated August 22, 1975, the Court held that the Company was the *alter ego* of Robert L. Vesco and, therefore, that the assets of the Company were available to satisfy the judgments against Vesco as an individual. The court thus never reached the alleged issue as to whether fraudulent conveyances had been effected. Orders were entered which had the effect of securing shares of stock now owned by the Company *without regard* to their prior ownership. Thus, stock beneficially owned by non-party third persons since approximately 1966, has been appropriated to satisfy the judgment against Vesco, although no one has even alleged, much less proved, any impropriety by anyone dating back anywhere near said period.

The Company duly filed and perfected an appeal to the Second Circuit. The Company argued on appeal that the court below had inconsistently granted plaintiff substantial rights to proceed as against the Company, while simultaneously denying the Company the right to be heard thereon. In short, in the view of the trial court, this defendant is *not* Vesco for purposes of appealing the lack of procedural and substantive due process, from service through judgment, and has *not* ever been permitted to be heard on the merits; however, it *is* Vesco for purposes of execution and collection.

Defendant's appeal, filed on September 19, 1975, resulted in a decision by the Second Circuit Court of Appeals, dated May 13, 1976, by which the default judgment entered against Vesco, which formed the basis of the proceedings against the Company, was determined to lack the requisite elements of "finality." The Court of Appeals, thus, found it unnecessary to pass upon the remaining substantial issues, and remanded the matter to the District Court for clarification and the entry of a "new judgment." Although merely remanding for further proceedings on this underlying issue of the finalty of the default judgment, the Court of Appeals did not expressly retain jurisdiction of the further consequential matters in dispute.

On May 21, 1976, ICC obtained an order to show cause from the District Court as to why a new amended judgment should not be entered *nunc pro tunc* as of July 12, 1974. On the return date of the order to show cause, May 26, 1976, the Company appeared to argue in vain its opposition to the entry of such a *nunc pro tunc* judgment. The court heard only brief argument and gave no substantial reasons for the extraordinary retrospective nature of the judgment entered. Thus, a new "final judgment"

was entered against Robert L. Vesco, purportedly effective as of almost two years earlier.

4. *The orders of the Court of Appeals*

Considerable confusion followed signing of the new amended judgment on May 26, 1976. On June 16, 1976, the Company's counsel received a copy of a letter from the attorneys for the plaintiff, addressed to the Clerk of the United States Court of Appeals for the Second Circuit, requesting guidance as to the status of the Company's original appeal. Counsel inquired:

> "Please advise whether the Court of Appeals is now in a position to proceed to determine the issues on the appeal or whether any further action is required to complete the record."

Upon receipt of this letter, the Company's attorneys also wrote to the Clerk expressing their own uncertainty "as to the appropriate procedure for bringing before the Court the still unresolved issues." The Company's counsel suggested that the court set a reasonable timetable for amendment and completion of the record and for submission of supplemental memoranda of law with respect to Judge Stewart's "recent action."

The Company first learned that the amended judgment had been entered,* when it received the Clerk's response on June 24, 1976, advising that the earlier appeal was no longer before the appellate court, and that:

> "[s]hould any further proceedings in the . . . litigation come before the court, the parties may, if so advised request the court to consider the matter on the briefs and appendix previously filed in that appeal, with whatever supplemental briefs they may desire to submit."

* Although the court docket apparently contains a notation that notice was sent of the filing of the amended judgment, petitioner's counsel did not receive a copy of the same. They may not even have been mailed a copy because the judgment was *not* against petitioner, although it was clearly an interested, and appearing, party.

The last sentence pointed out that "the court cannot, of course, give any advisory opinion on the effect of the District Court's judgment entered May 27, 1976, ordered entered *nunc pro tunc* as of July 12, 1974."

Thus, learning in late June that the amended judgment had been docketed, and being in a quandry (as were the attorneys for plaintiff) as to the proper avenue for further proceedings, counsel for appellant herein filed its notice of appeal on July 7, 1976.

On August 4, 1976, almost a full month later, the Company was served with ICC's notice of motion to dismiss on the ground that the "Notice of Appeal was not timely filed and that no order has been entered extending the time for the filing of said Notice of Appeal."

The Company, on August 31, 1976, filed a notice of cross-motion for reacceptance of jurisdiction of the issues presented before the Second Circuit on the earlier appeal (25a). By orders dated September 14, 1976 (1a), the Second Circuit granted ICC's motion to dismiss, and denied petitioner's cross-motion for reacceptance of jurisdiction. Petitioner seeks review only from the order of the Court of Appeals which denied petitioner's cross-motion for reacceptance of jurisdiction of those issues properly presented, but undecided, on the earlier appeal, as affected by subsequent events.

REASONS FOR GRANTING REVIEW

I. Interests of fairness require that the Court of Appeals reassume jurisdiction over issues left undecided on the earlier appeal.

The Second Circuit upon the original appeal did not decide all of the issues presented, and did not expressly reserve jurisdiction over same, but remanded the matter to the District Court for further proceedings on the threshold issue of whether the judgment sought to be enforced was final. By denying petitioner's motion to reaccept jurisdiction, after its untimely appeal was rejected, the Court of Appeals, in essence, summarily affirmed the new amended judgment against the Company, based upon prior judgments by default entered against Vesco, without permitting the Company the opportunity to challenge the procedural or substantive propriety of the underlying judgments or of the decision imposing derivative liability on it for judgments entered against a different party. In effect, then, the Company has been subjected to massive judgments while simultaneously being foreclosed from contesting the merits of those judgments.

Indeed, from the outset, the Company, despite numerous motions, comprehensive briefs and repeated protestations of the infringement of its rights, has been denied the opportunity to litigate the merits of the underlying claims. The Company sought so to protect itself and its rights because it was openly and often stated in court that ICC would attempt to satisfy claims against Vesco by levying upon the assets of the Company.

In the District Court, upon partial inquest, counsel for the Company requested a hearing on the merits, and was rebuffed with this promise:

> "THE COURT: I think there may be reasons to believe that you ought to have that full hearing. I would like to proceed this morning and I don't intend to require you to take positions today that you have not thought out and that you are not prepared to take because you have not developed a record.
>
> "It seems to me we ought to proceed this morning and certainly I will give you full opportunity to be heard.
>
> "I don't mean to suggest—I do mean to suggest, but I don't mean to reach any conclusion that by permitting you to participate at this state that I have made up my mind in any respect as to the ultimate question of whether or not your client can be subjected to liability."

On July 12, 1974, as the partial inquest continued, the following dialogue took place between Mr. Laurence B. Orloff, Esq., representing the Company, and the Court:

> "MR. ORLOFF: Your Honor, I should have an an opportunity to put some evidence before the Court also, and I would most respectfully say that I should have the opportunity to put forth evidence, not only as to the dollar figure of any damage award, but also as to the liability issue.
>
> "I realize that the plaintiff has taken a contrary position in its memorandum, but, as we suggested to your Honor in our memorandum, both from the standpoint of Vesco & Co.'s potential vulnerability for any judgment against Robert Vesco, and by virtue of the fact that there has been a conspiracy alleged among a number of defendants, who have not had a chance to defend themselves as yet, on this issue, no judgment should be entered until that defense is put in.
>
> "THE COURT: I have these thoughts about it:
>
> It seems to me that in terms of the dollars, Mr. Carroll has told us what they are, and my notion is that this is reasonably clear.

"On the other hand, what you say about the merits concerns me. I think I am obligated to give you a hearing on the question of conspiracy and on the merits. I'd like to do it promptly. What's your notion on it?

"MR. ORLOFF: Within some reasonable time period, your Honor. I don't mean months, but I am talking certainly about several weeks. I would be ready on that." (30a)

And later at that same hearing:

"MR. ORLOFF: I was going to ask of Mr. Carroll through the Court whether I am therefore assured, and I guess I must respectfully ask the Court, too, that if a judgment were to be entered against Robert L. Vesco alone, would Vesco & Co. have an opportunity at a later date to be heard fully on the merits?

"THE COURT: I have just been told by Mr. Carroll he doesn't want a judgment against Vesco & Co., Inc.

"MR. ORLOFF: I think he is going to come in for one later on, and I want to make sure I will get my full hearing.

"THE COURT: Of course you will." (39a)

In another case entitled *ICC v. Vesco* (74 Civ. 1588), the Company was denied intervention and judgment by default was taken against Vesco in the amount of $2,900,-000. It is this judgment as well which plaintiff and the court below here intend to effectuate, by collection of the Company's assets.

In a hearing on that case held October 2, 1974, on the Company's motion to intervene, the following colloquy took place between counsel for the Company and Judge Stewart:

"THE COURT: So that it seems to me the question you are raising is in all respects premature.

"MR. ORLOFF: If my client, Vesco & Co., has the right to challenge the existence of the cause of action at some point in time, if that is what your Honor means by premature, then I can see an [*sic*] accept your Honor's point. At the moment there is nobody raising that point. There is nobody pointing out to the court that there is no claim here really of corporate opportunity.

"THE COURT: *Of course, the question will be presented to you if and when somebody comes after your client to try to get some of your assets, and then you will have full opportunity to litigate everything.*" (emphasis added) (42a).

A few moments later, the court made the following pronouncement:

"THE COURT: . . . I would suppose it is possible that there might be a way to raise a claim that no cause of action was stated and that therefore you can't come after me. I don't think we have to worry about that at this point.

It seems to me that the situation we are in today, Mr. Orloff and Mr. Camhy, is this: I am fully aware of the problems which are involved in this matter. I know who Vesco is. I know what Vesco & Co. is.

Of course, you are not going to take the position that you are Vesco, which you aren't.

And, of course, if Mr. Camhy reaches the point where he thinks he can go after Vesco & Co., Inc. to satisfy a judgment against Vesco, you are going to have the fullest opportunity to make whatever presentation you want."

Despite these repeated assurances from the District Court that the Company would have full and due opportunity to contest the merits of the underlying claims and related due process issues, the court abruptly foreclosed

the Company's rights and refused to consider any proofs on the legal propriety of the judgments now sought to be pressed against the Company.

No longer is the Company's assertion of its right to be heard on the merits "premature." Indeed, the propitious moment has come and gone unheralded.

Memoranda submitted both before and after such "partial inquest" dealt squarely with the issue of the Company's right to be heard on these issues. In the Company's prehearing memorandum in the case *sub judice*, for instance, it argued that because of the unique nature of ICC's allegations that the Company is merely the *alter ego* of Vesco, it should be entitled to contest any aspect of the liability asserted against him.

In light of the manifestly cursory and summary considerations given by the District Court to this matter on remand and, further, in consideration of the paramount significance of these remaining issues to the petitioner, it is respectfully submitted that the Court of Appeals should have reassumed and accepted jurisdiction of these earlier issues. Refusal to do so denies to petitioner and all parties concerned full and final appellate review, and is manifestly unfair and unjust.

It is submitted that this is one of those rare cases where the "interests of justice" require intervention by this Court despite expiration of the time to appeal. *cf. Gondeck v. Pan Am World Airways*, 382 U.S. 25, 86 S. Ct. 153, 15 L.Ed. 2d 21, (1965); *United States v. Ohio Power Co.*, 353 U.S. 98, 77 S. Ct. 652, 1 L.Ed. 2d 683 (1957).

The instant situation is substantially similar to *Cahill v. New York, N.H. & H.R. Co.*, 351 U.S. 183, 76 S. Ct. 758, 100 L.Ed. 1075 (1956), where interests of fairness compelled this Court to recall a District Court judgment, so

as to remand the cause to the Court of Appeals for determination of a question left undecided on a prior appeal.

There, from a judgment of the District Court in favor of the plaintiff in an action under the Federal Employees' Liability Act, the defendant railroad appealed to the Court of Appeals on two grounds: (1) there was insufficient evidence to permit the submission of the case to the jury; (2) the trial judge erroneously admitted evidence of prior accidents at the scene of plaintiff's injury. The Court of Appeals reversed on the ground that there was insufficient evidence to support the verdict. The judgment of the Court of Appeals was reversed by the United States Supreme Court and the railroad's petition for a rehearing was denied. After a certified copy of the judgment was sent to the District Court, that court denied an application for a stay of execution, and the judgment was satisfied, but plaintiff was informed that defendant intended to pursue its remedies notwithstanding payment of the judgment. The defendant then filed in the Supreme Court a motion to recall and amend the judgment, so as to remand the cause to the Court of Appeals for a determination of the question left undecided on the original appeal, to wit, whether the trial judge erred in admitting evidence of prior accidents.

The defendant's motion to recall was granted, in view of the fact that the original order of the Supreme Court was erroneous and the recall was in the interest of fairness. Moreover, Supreme Court Rule 58(4), which bars consecutive and out-of time petitions for rehearing, was held not to prohibit the motion, to correct the error there involved.

See also: *Boudoin v. Lykes Bros. S.S. Co.*, 350 U.S. 811, 76 S.Ct. 38, 100 L.Ed. 727 (1954).

The situation here presented parallels that in *Cahill* and, petitioner submits, presents equities even more com-

pelling to the conclusion that jurisdiction over undecided issues should have been reaccepted. By refusing to so act, the Court of Appeals has, in essence, affirmed the District Court's actions whereby plaintiff has been granted substantial rights to proceed as against the Company, while simultaneously denying the Company the right to be heard thereon. In short, in the view of the trial court, and with the indirect imprimatur of the Court of Appeals, this defendant is *not* Vesco for purposes of appealing the lack of procedural and substantive due process, from service through judgment, and has *not* ever been permitted to be heard on the merits; however, it *is* Vesco for purposes of execution and collection. The actions of the courts below were manifestly unfair and unjust, and it is now left to this Court to exercise its power of supervision to remedy those wrongs.

It should be noted that, in effect, the procedural confusion was created by the Court of Appeals. The Company filed a timely appeal from the only judgment affecting it—to wit, that it was the *alter ego* of Robert Vesco. Rather than deciding the issues raised by the Company, the court remanded for resolution of issues concerning the judgment against Robert Vesco, not the Company. The new amended judgment was not a judgment or order directly affecting the Company. It had uncertain standing to appeal from that judgment. The Second Circuit in the first instance should have retained jurisdiction, or at least reaccepted jurisdiction when the Company so moved. It should be noted that no party could demonstrate any prejudice in view of the time span involved; the Company's briefs had been filed as of the time of the September 14, 1976 decision of the Court of Appeals and the entire controversy could have been decided on the merits in a matter of weeks. Nonetheless, the Company's efforts

to secure appellate review were rebuffed, without recourse except to this Court.

II. The issues raised, but undetermined, in the prior appeal are substantial and draw into question elemental issues of justice, which should have been retained by the Court of Appeals in the first instance or reaccepted upon later application.

From the outset, the Company has vigorously contended that the parties to be charged with staggering judgments have been treated in a manner inconsistent with all notions of fundamental due process. The issues raised on perfected prior appeal, but left unreviewed and undecided on the merits by *any* appellate court, may be roughly summarized, as follows:

1. *Form of Judgment*

The default judgment as entered below, and indeed the amended judgment entered on May 27, 1976, are unclear, confusing and uncertain on their face. The judgments in question purport to dispose of one count of the complaint and "so much of" six other counts as relate to various categories of transactions. It is, frankly, impossible to determine what matters and portions of the pleadings have been disposed of and what remains for further proceedings. Moreover, it cannot be determined from the face of the original judgment (or, for that matter, from the amended judgment) whether the matters determined are those of the original complaint or of the amended complaint. As to the amended complaint, the plaintiff filed an affidavit of purported service, but there has been no determination as to whether that service was effective or valid. The entry of an amended judgment in May of 1976 in no way cleared up this confusion, leaving con-

tinuing uncertainty as to whether "finality" exists for purposes of execution and further proceedings. See *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 91 S. Ct. 1076, 28 L.Ed. 339 (1971).

Similarly, the judgments, both original and as amended, purport to be "final," although they do not dispose of all of the issues between the parties, all of the issues as to the defendant Vesco, or even all of the issues in some counts of the complaint. Under these circumstances, it is hard to imagine how such a judgment could be final or provide a basis for further collection proceedings. See, *United States v. Burnett*, 262 F.2d 55 (9 Cir. 1959).

2. *Complaint v. Amended Complaint*

The default judgment here at issue is purportedly based upon a complaint filed in June of 1973, and allegedly served upon Robert L. Vesco on July 30, 1973. On September 7, 1973, respondent ICC served a complete amended complaint adding new parties and claims. On October 1, 1973, respondent ICC moved for entry of default on the original complaint which had already been superseded by an amended pleading. On October 5, 1973, "judgment by default" was entered on the original complaint as against Robert L. Vesco and all further proceedings have purportedly been on the basis of the original complaint. There has been no finding at any time that the amended complaint was properly served on Robert L. Vesco. Counsel for the Company have attempted to argue that, upon the filing of an amended pleading complete in itself, the original complaint is completely superseded and all further proceedings must be based on the amended pleadings. *Washer v. Bullitt County*, 110 U.S. 558, 4 S.Ct. 249, 28 L.Ed. 249, 250 (1884); *Lubin v.*

Chicago Title and Trust Company, 260 F.2d 411, 413 (7 Cir. 1958); *Bullen v. DeBretteville*, 239 F.2d 824, 833 (9 Cir. 1956), *cert. den. sub nom. Treasure Co. v. Bullen*, 353 U.S. 947, 77 S.Ct. 825, 1 L.Ed.2d 856 (1957); *Phillips v. Murchison*, 194 F. Supp. 620, 621-622 (S.D.N.Y. 1961); *Hutchins v. Priddy*, 103 F. Supp. 601, 606-607 (W.D. Mo. 1952); 3 *Moore's Federal Practice*, ¶ 15.08[7], p. 939 (2d ed. 1974).

For these reasons, it would appear that the default judgment, based upon an abandoned complaint, is facially void and ineffective.

3. *The right of Vesco & Co., Inc. to be heard on the merits of the claims*

Nearly from the outset, respondent ICC has made it clear that it intended to seek satisfaction of any judgment it obtained as against Robert L. Vesco out of the assets of the Company, although it is not, and never has been alleged that the Company played any role in the alleged wrongful conduct as set forth in the complaint and amended complaint. Throughout, the Company has taken the position that it should, at some point, be entitled to be heard on the merits of the underlying claims and on the propriety of the procedural and substantive determinations which, in the final analysis, were to be charged against the defendant company. At every turn, this opportunity was foreclosed, leading ultimately to the anommalous situation of the Company being subject to execution on judgments totalling in excess of $5,000,000 without ever once having the chance to argue the merits of the underlying controversies. Moreover, other pleadings filed in this case demonstrating that some of the exact claims covered by ICC's judgment were settled with other defendants, but the amount received was not credited to

the Company. This rough justice is improper and legally erroneous. See *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 93 S. Ct. 647, 34 L.Ed. 2d 577 (1973) *reh. den.* 410 U.S. 975, 93 S. Ct. 1434, 35 L.Ed. 2d 707 (1973); *United States v. Borchardt*, 470 F.2d 257 (7 Cir. 1972); *cf. Modern Brokerage Corp. v. Massachusetts Bond & Insurance Co.*, 54 F. Supp. 939 (S.D.N.Y. 1944).

4. *Finality*

Although the District Court ultimately determined, on remand, that it had intended to enter, and did enter, a final judgment by default as against Robert L. Vesco, there survives a continuing question as to propriety of the entry of a final judgment against but one alleged co-conspirator in a matter involving stated joint action and alleged joint liability. This situation is particularly exacerbated by the fact that the "final" judgments, both original and amended, deal with but broad categories of claims and do not even finally delimit those counts of the pleadings which are the subject of judgment. In these circumstances, the entry of a final judgment, the basis for execution proceedings as against the Company, is wholly improper. *Frow v. De La Vega*, 82 U.S. 552, 554, 21 L.Ed. 60 (1872); *United States v. Peerlees Insurance Company*, 374 F.2d 942 (4 Cir. 1967); 6 *Moore's Federal Practice*, ¶ 54.52 and ¶ 54.43[5]. *Exquisite Form Industries, Inc. v. Exquisite Fabrics of London*, 19 F.R. Serv. 197 (S.D.N.Y. 1974).

5. *Alter Ego—The evidence and the result*

On very skimpy evidence, the District Court concluded, after a brief hearing, that the Company was the *alter ego* of Robert L. Vesco and, therefore, that its assets were available in satisfaction of creditors' claims against Vesco. Without recounting the evidence herein in detail,

it is sufficient to say that the court below invoked this extraordinary doctrine on the basis of insufficient evidence at odds with applicable decisional law.

Equally importantly, the District Court, in effect, ordered a forfeiture of *all* assets of the Company, despite the fact that other persons have substantial beneficial interests in the Company. These persons were never made party to this proceeding and, thus, even if ICC were to be permitted to pursue assets of the Company transferred by Robert L. Vesco, there exists no basis of *any kind* upon which the assets of other persons could be similarly forfeited. This flagrant abuse of justice, to the detriment of non-party third persons, remains unremedied and constitutes perhaps the most palpably unjust result of the proceedings below.

6. *The Judgment Nunc Pro Tunc**

The propriety of the new amended judgment, and particularly its entrance *nunc pro tunc* as of July 12, 1974, has never been, but should be, considered by an appellate court. The entrance of such a *nunc pro tunc* judgment was clearly erroneous. Excluding situations in which a litigant dies subsequent to the commencement of an action, but prior to its conclusion, judgment will be entered *nunc pro tunc—i.e.*, given retroactive effect back to a date certain—only when the judgment was not entered on that date due to the failure of the clerk to properly perform his ministerial function of entering judgment due to error, unwarranted delay, or *other reasons unrelated to the legal*

* This issue resulted from proceedings immediately following the remand by the Second Circuit and was, therefore, not part of the perfected first appeal. The confusion ensuing from the apparently complete remand caused this fundamental issue also to be foreclosed from appellate review. However, its import and implication serves as a stark object lesson of rough-shod justice accorded to the Company, and indeed any other person ICC conclusionarily thrusts under the "Vesco" umbrella.

issues of the case. 6A *Moore's Federal Practice* ¶58.08 (1974); *Recile v. Ward*, 496 F.2d 675 (5 Cir. 1974), *mod., rehearing den.*, 503 F.2d 1374 (5 Cir. 1974); *Cairns v. Richardson*, 457 F.2d 1145 (10 Cir. 1972).

Absolutely no showing was made or attempted by ICC to the effect that the new judgment was occasioned by clerical error or for non-legal reasons. Indeed, none could be made because the new judgment contains two *new* substantive provisions: (1) ICC deleted its prior reservation to prove additional damages on some claims, and (2) ICC included a rule 54(b) certification of no just reason for delay although nothing was presented to the court in connection therewith. All prior judgments were submitted by ICC and the changes made were for legal, substantive reasons making the use of *nunc pro tunc* patently erroneous.

Moreover, the relationship back at best should have been to July 16, 1974 (the date of entry of the prior judgment), not July 12, 1974 (the date the prior judgment was signed). Although called to the trial court's attention, it declined to make even this clearly required change, demonstrating its indifferent attitude to the plight of petitioner.

* * *

The above issues, most properly before the Second Circuit in the first instance, have never been reviewed or ruled upon by the Court of Appeals. After preliminarily determining that certain obvious deficiencies appeared from the face of the original default judgment, the Second Circuit remanded the matter to the District Court for clarification on the issue of finality. For this reason, the remaining issues were not at that time considered or disposed of. However, despite the fact that the Court of Appeals was apparently merely remanding the cause for

"clarification," there was no express retention of jurisdiction.

The District Court proceedings, in summary fashion, "clarified" the status and entered a new final judgment, *nunc pro tunc* to a date almost two years earlier, within two weeks of the decision by the Second Circuit.

It was unclear, both to counsel for the Company and to counsel for ICC, whether the matter would proceed directly to the Second Circuit without the necessity of further filings, which appeared to be the most logical and expeditious course under the circumstances. However, the absence of an express retention of jurisdiction apparently foreclosed this step and the matter proceeded in the direction of an aborted second appeal on the same issues. Even though the *mutual* confusion stemmed from the misunderstood fact of complete remand, the Court of Appeals refused upon due motion to reassume jurisdiction. As a consequence, and because of the late filing of the second appeal, which merely renewed the substantive items of the first appeal, the Company has been denied appellate review of *any* of the aforesaid substantial issues. Perhaps this treatment is consistent with the sad and shocking manner that the Company has been treated throughout by the trial court, but it certainly is not consistent with any notions of substantial justice and fair access to the courts as long recognized by this Court. It is respectfully submitted that this Court should, for these reasons, finally give the Company its due "day in court" whatever the ultimate result. To rule otherwise, would be to countenance the most flagrant abandonment of equal treatment imaginable.

CONCLUSION

Petitioner respectfully submits that this case presents the overriding issue of whether litigants will be treated fairly before the courts, and will be granted their full day in court before being subjected to the forefeiture of their assets by reason of judgments entered against another person.

For all of the foregoing reasons, a common law certiorari should be granted or, alternatively, a writ of mandamus should issue to review the order of the United States Court of Appeals for the Second Circuit.

/s/ Albert G. Besser
ALBERT G. BESSER
A Member of the Firm

HANNOCH, WEISMAN,
STERN & BESSER,
Attorneys for Petitioner

744 Broad Street,
Newark, New Jersey 07102

APPENDIX

ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED SEPTEMBER 14, 1976

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of September, one thousand nine hundred and seventy-six.

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated August 4, 1976 to dismiss the appeal from the United States District Court for the Southern District of New York for lack of jurisdiction be and it hereby is granted.

A. DANIEL FUSARO,
Clerk

By: Edward J. Guardaro
Senior Deputy Clerk

Before: Hon. Robert P. Anderson
Hon. Walter R. Mansfield
Hon. William H. Mulligan
Circuit Judges

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of September, one thousand nine hundred and seventy-six.

It is hereby ordered that the motion made herein by counsel for the Vesco & Co., appellant, by notice of cross-motion dated August 30, 1976 for reconsideration of the issues raised in an earlier appeal (Docket No. 75-7548) be and it hereby is denied.

A. DANIEL FUSARO,
Clerk

By: Edward J. Guardaro,
Senior Deputy Clerk

Before: Hon. Robert P. Anderson
Hon. Walter R. Mansfield
Hon. William H. Mulligan
Circuit Judges

ORDER AND OPINION OF SECOND CIRCUIT FILED MAY 13, 1976

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of May, one thousand nine hundred and seventy-six.

Present: Hon. Irving R. Kaufman
Chief Judge

Hon. J. Joseph Smith
Hon. Robert P. Anderson
Circuit Judges

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the action of said District Court be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

By: Vincent A. Carlin
Chief Deputy Clerk

Before: KAUFMAN, *Chief Judge*, SMITH and ANDERSON, *Circuit Judges*.

Appeal from order permitting execution against corporate assets on default judgment against individual. Remanded for clarification of judgment and determination of specific claims on which money judgment entered.

JAMES J. SHRAGER, Newark, N.J. (Hannoch, Weisman, Stern & Besser, Newark, N.J., Susan I. Littman, on the brief), and Arum, Friedman & Katz, New York, N.Y., *for Appellant*.

MILTON S. GOULD, New York, N.Y. (Shea, Gould, Climenko, Kramer & Casey, New York, N.Y., Daniel L. Carroll, of Counsel), *for Appellee*.

SMITH, *Circuit Judge*:

Vesco & Co., Inc. (hereinafter the Company) is a personal holding company owned and controlled by financier Robert L. Vesco (hereinafter Vesco) and his family. The Company appeals from a decision rendered against it on August 22, 1975, in the United States District Court for the Southern District of New York (Charles E. Stewart, Jr., *Judge*). That decision permits plaintiff-appellee International Controls Corp. (hereinafter ICC) to pierce the Company's corporate veil and use the Company's corporate assets to satisfy a judgment entered against Vesco personally.

For the reasons outlined below, we remand this controversy to the district court for further proceedings.

I. Background

The instant appeal stems from the continuing efforts of ICC to recover damages against Vesco, his associates and various corporations controlled by the Vesco interests. Since the earlier stages of this saga have been examined elsewhere, *International Controls Corp. v. Vesco*, 490 F.2d 1334 (2d Cir. 1974), it is necessary for us to describe here only the most recent events in this extended litigation.

On June 7, 1973, the Special Counsel for ICC filed an action charging Vesco, Vesco's associates and many of the companies controlled by Vesco with having violated §10 (b) of the Securities Exchange Act of 1934, Rule 10b-5 of the Securities and Exchange Commission and a variety of common law fiduciary duties. 15 U.S.C. §78j(b), 17 C.F.R. §240.10b-5. The heart of ICC's complaint against Vesco and his co-defendants is their alleged waste and misuse of ICC's corporate assets to the detriment of ICC's other shareholders.

On October 5, 1973, a default judgment was entered against Vesco, as a result of Vesco's failure to appear in the Southern District of New York along with the other defendants. The judgment of October 5, 1973, while establishing Vesco's personal liability, did not fix the amount of damages.

Following several hearings on the question of damages, a second default judgment was entered against Vesco on July 12, 1974. This latter judgment specified damages of $2,422,466.72, but left open the possibility that ICC might be able to prove further damages in subsequent proceedings.

Thus armed with two default judgments against Vesco, ICC attempted to satisfy its judgments with the corporate assets of the Company. ICC argued that the facts of the

case warranted the piercing of the Company's corporate veil and the use of the assets of the Company to satisfy the judgments entered against Vesco personally. On August 22, 1975, Judge Stewart accepted ICC's arguments and issued an order authorizing ICC to satisfy its default judgments against Vesco with the assets of the Company.

It is from the order of August 22, 1975, that the Company appeals.

The Company advances four arguments for the reversal of Judge Stewart's order of August 22, 1975. First, the Company asserts that it was improper for the district court to pierce the Company's corporate veil and allow ICC to use the Company's assets to satisfy personal judgments against Vesco.

Second, the Company argues that the two default judgments which the execution order of August 22, 1975, is intended to satisfy were entered improperly since the Company was denied the right to present Vesco's personal defenses before the entry of the default judgments. Had Vesco been present to defend himself, the Company asserts, he would have raised two issues, alleged defects in the service upon him and alleged defects in ICC's pleadings below. Had these defenses been entertained by the court, the Company continues, they would have prevented the entry of default judgments against Vesco and thereby would have eliminated the basis for the subsequent execution order against the Company. It was thus a mistake, the Company concludes, for Judge Stewart to forbid the Company to raise those personal defenses on Vesco's behalf.

The Company argues, third, that certain assets which it holds are owned beneficially by Vesco's children and that those assets should be removed from the scope of the August 22, 1975. execution order. Finally, the Company

asserts that the two default judgments entered against Vesco were not final and that, therefore, they cannot provide the basis for the subsequent execution order issued against the Company on August 22, 1975.

Since it is unclear from the record below whether, in fact, the default judgments against Vesco were final and therefore subject to execution, we remand for further proceedings.

II. The Issue of Finality

It is well-established that "execution ordinarily may issue only upon a final judgment." *Redding & Co. v. Russwine Construction Corp.*, 417 F.2d 721, 727 (D.C. Cir. 1969); 3 C.J.S. *Executions* §6c.

The order issued by Judge Stewart on August 22, 1975, was the first step in ICC's efforts to secure execution of the two default judgments entered earlier against Vesco. Hence, the validity of the August 22, 1975, execution order against the Company depends upon the finality of the earlier default judgments which that execution order is intended to satisfy. Only if the underlying judgments against Vesco are final is the subsequent execution order against the Company valid.

The Company argues that the default judgments entered against Vesco were not final. The Company points out that the first judgment entered against Vesco on October 5, 1973, did not specify the damages owed by Vesco to ICC. The failure to so specify, the Company claims, makes the first judgment interlocutory, rather than final, in nature.[1]

1. The judgment of October 5, 1973, reads as follows:

JUDGMENT

This action having been commenced by the filing of a complaint and the issuance of a summons on the 7th day of June, 1973, and this court by order dated July 27, 1973, having authorized Lois Sylor Yohonn to effect service

With respect to the second judgment entered on July 12, 1974, the Company points out that the judgment affords

of process herein on defendant Robert L. Vesco, and a copy of the said summons and complaint having been duly served on defendant Robert L. Vesco by Lois Sylor Yohonn on the 30th day of July, 1973, and proof of such service having been filed in the office of the Clerk of this Court on the 6th day of August, 1973; and

Defendant, ROBERT L. VESCO, having failed to plead, appear, move or otherwise defend with respect to the complaint herein, and the time for said defendant to appear answer or otherwise move having expired, and said defendant's default having been noted and entered;

AND, it appearing to the court that there is no just reason for delay in entering the within judgment against defendant Robert L. Vesco;

NOW, on motion of Shea Gould Climenko & Kramer attorneys for the plaintiff, and, upon the affidavit of Sheldon D. Camhy, sworn to the 2nd day of October, 1973 that defendant Robert L. Vesco is not an infant or incompetent person and is not in the military service of the United States; it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff have judgment against the defendant Robert L. Vesco as demanded in the complaint herein; and it is further

ORDERED, ADJUDGED AND DECREED that defendant Robert L. Vesco be, and he hereby is, permanently enjoined from using the assets of plaintiff or its subsidiaries or the proceeds thereof for his own purpose to the loss and detriment of International Controls Corp. and its shareholders; and it is further

ORDERED, ADJUDGED AND DECREED that defendant Robert L. Vesco account to plaintiff for all profits or gains received by him or those acting in concert with or aiding and abetting him in the transactions set forth in the complaint herein or in transaction thereafter entered complaint herein or in transaction thereafter entered into by him with funds or property wrongfully held by him by reason of the wrongful acts set forth in the complaint and all injury sustained by plaintiff by reason of the acts alleged in the complaint; and it is further

ORDERED, ADJUDGED AND DECREED that Robert L. Vesco be and he hereby is required to indemnify plaintiff for all liability to others which it has or may incur by reason of the acts alleged in the complaint; and it is further

ORDERED, ADJUDGED AND DECREED that defendant Robert L. Vesco be and he hereby is, liable to plaintiff for all loss, damage, cost and expense arising from the acts alleged in the complaint herein and that the amount of said loss, damage, cost and expense be determined by the Court upon a hearing; and it is further

ORDERED, ADJUDGED AND DECREED that the aforesaid hearing as to plaintiff's loss, damage cost and expense be set down and held on a day designated by plaintiff, upon the plaintiff giving defendant Robert L. Vesco ten days notice of said hearing by registered or certified mail at Brace Ridge Road, Nassau, The Bahamas and 170 Denville Road, Boonton Township, New Jersey 07005; and it is further

ORDERED, ADJUDGED AND DECREED that upon the holding of the aforesaid hearing as to plaintiff's damages and the determination of said damages, the within judgment be amended granting plaintiff judgment against defendant Robert L. Vesco for the amount of such loss, damage, cost and ex-

ICC the opportunity to prove additional damages in subsequent proceedings.[2] In addition, the Company points out that the judgment of July 12, 1974, does not contain the certification of finality required by Rule 54(b) of the Federal Rules of Civil Procedure in cases, such as this, where judgment is entered against one defendant while the other co-defendants continue to contest liability in the district court. Fed. R. Civ. P. 54(b).[3]

pense together with interest and costs and disbursements of this action and that such amended judgment be entered against defendant Robert L. Vesco; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff shall have the right to apply at the foot of said judgment for such other and further relieve [sic] as to the Court may seem just and proper in the circumstances.

/s/ Charles E. Stewart, Jr.
U.S.D.J.

2. The judgment of July 12, 1974, reads as follows:

A judgment having been entered herein against Robert L. Vesco on October 5, 1973;

AND this cause having been brought on for partial inquest before the Court on May 14 and 22, 1974 and July 12, 1974, after the required notice was given to defendant Robert L. Vesco, and plaintiff having offered proof establishing damages in the amount of $2,188,354.93; it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiff recover of defendant Robert L. Vesco the sum of $2,188,354.93 plus interest on said sum at the rate of 6% from March 1, 1973, or a total of $2,422,466.72 and that plaintiff have execution therefor; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff shall have the right to prove such additional loss, damage, cost and expense it has suffered by reason of the acts alleged in the complaint, the amount of such additional loss, damage, cost and expense to be determined by the Court upon an additional hearing or hearings to be held as provided for in said October 5, 1973 judgment.

Dated: New York, New York — /s/ Charles E. Stewart, Jr.
July 12, 1974 — U.S.D.J.

3. Rule 54(b) reads as follows:

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b).

These two flaws in the second judgment, the Company maintains, make that judgment interlocutory also. Hence, the Company concludes, neither judgment against Vesco is final and thus the execution order issued against the Company on August 22, 1975, is invalid in the absence of an underlying final judgment.[4]

It is the position of ICC that the second judgment issued on July 12, 1974, is final and therefore provides a proper basis for the August 22, 1975, execution order issued against the Company.[5] On the question of the Rule 54(b) certification, ICC points out that the first judgment did contain such a certification.[6] Since the second judgment refers back to and is an extension of the first,[7] ICC asserts, the Rule 54(b) certification of the first judgment must be imputed to the second.

Futhermore, ICC maintains that a judgment, such as the second judgment issued on July 22, 1975, is final as long as it specifies some amount of damages which the plaintiff can collect. Finality, ICC argues, does not require that a judgment specify all damages as long as it provides a minimal dollar figure which the plaintiff can collect while proving additional damages.

4. The Company also argues that, notwithstanding the terms of Rule 54(b), the decision of the United States Supreme Court in *Frow v. De La Vega*, 82 U.S. 552 (1872), still forbids the entry of a final judgment against one defendant while the others continue to contest liability in the district court. We think it is most unlikely that *Frow* retains any force subsequent to the adoption of Rule 54(b). In any event, at most, *Frow* controls in situations where the liability of one defendant necessarily depends upon the liability of the others. *Redding & Co. v. Russwine Construction Corp.*, 463 F.2d 929, 932-33 (D.C. Cir. 1972). Since Vesco's liability in the instant setting does not depend upon that of any of his co-defendants, Vesco cannot avail himself of whatever authority *Frow* might retain.

5. ICC makes no attempt on appeal to argue that the judgment of October 5, 1973, constitutes a final judgment. Since that judgment specifies no damages whatsoever, it, of course, cannot be considered final. *Western Geophysical Co. of America, Inc. v. Bolt Associates, Inc.*, 463 F.2d 101 (2d Cir. 1972), *cert. denied*, 409 U.S. 1040 (1972).

6. See note 1, *supra*, ¶3.

7. See note 2, *supra*, ¶¶1 and 4.

This court has repeatedly stressed the importance of strict adherence to the certification requirements of Rule 54(b). See, *e.g.*, *Browning Debenture Holders Committee v. DASA Corp.*, 524 F.2d 811, 814 n.4 (2d Cir. 1975); Wright & Miller, *Federal Practice and Procedure: Civil* §2660. The confusion surrounding the instant appeal demonstrates the need for such careful compliance.

We are frankly unsure whether the district court originally intended for the Rule 54(b) certification contained in its first judgment to apply to its second judgment as well. While that is one reasonable interpretation of the second judgment and while Judge Stewart indicated about one year after entry of the second judgment that this interpretation was the proper one, the very terms of Rule 54(b) require that certification of finality be "express" so as to avoid any ambiguity.

The failure to comply with the literal requirements of Rule 54(b) with respect to the second judgment might not, by itself, have compelled a remand to the district court although, as we noted in *Browning Debenture Holders Committee*, *supra*, we view strict compliance with Rule 54(b) as a matter of the greatest importance. However, other ambiguities in the judgment of July 12, 1974, compel us to return this case to the district court. In particular, the decision of the district court to allow for additional proof of damages prevents us from characterizing the second judgment of July 12, 1974, as final.

"A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the courts to do but execute the judgment." *Catlin v. United States*, 24 U.S. 229, 233 (1945). The judgment of July 12, 1974, does not end this litigation with respect to Robert L. Vesco: ICC retains the right to appear and assert additional damages against him. Because the judgment leaves

ICC that option, it cannot be viewed as final since finality implies that, after the entry of judgment, the court will concern itself with nothing other than the mechanics of execution.

The circumstances here are quite similar to the facts in *United States v. Burnett*, 262 F.2d 55 (9th Cir. 1958, 1959). In *Burnett*, an airline passenger sued the United States for injuries sustained as a result of poor maintenance at a federally-owned airport. After finding for the plaintiff on the issue of liability and after deciding on part of the damage award to which the plaintiff was entitled, the district court entered a judgment declaring the government's liability under the Federal Tort Claims Act and fixing partial damages. However, the district court in *Burnett*, like the district court here, left open the possibility that the plaintiff might prove additional damages at a later date.

On appeal, the Court of Appeals for the Ninth Circuit held that "the legal effect of what the [district] court did was to announce and enter an interlocutory decision." Because the provision allowing for proof of future damages "made it clear that the [district] court had not finally disposed of the law suit," the judgment could not be construed as final. *Burnett*, *supra* at 59.

Burnett was cited with approval by this court in *Aetna Casualty & Surety Co. v. Giesow*, 412 F.2d 468 (2d Cir. 1969). While there were other grounds for our decision in *Giesow*, we indicated on the authority of *Burnett* that a judgment fixing certain damages but not others could not be considered final. *Giesow*, *supra* at 470.

In short, a judgment cannot be considered final as long as it leaves open the question of additional damages. The essence of a final judgment is that it leaves for the court nothing to do but order execution.

There is, however, one aspect of the situation here which distinguishes it from *Burnett* and *Giesow* and which leads us to remand, rather than reverse, the decision below. In both *Burnett* and *Giesow*, the plaintiffs advanced a single claim. Here, in contrast, ICC asserts multiple claims against Vesco alleging violations of §10(b) of the Securities Exchange Act of 1934, violations of Rule 10b-5 of the Securities and Exchange Commission, breach of fiduciary duties, waste of corporate assets, fraud, and corporate self-dealing.

In a situation, such as that on appeal, where liability is established on multiple claims, Rule 54(b) authorizes the district court to determine the damages stemming from some of the claims and to enter final judgments with respect to them, while retaining jurisdiction over the other claims in which damages have not yet been proven. Such a procedure is not required in multi-claim suits, but it is permitted if the district court makes the proper certification. Fed. R. Civ. P. 54(b); see also Wright & Miller, *Federal Practice and Procedure: Civil* §§2653, 2654.

Burnett and *Giesow* establish that, for a final judgment to be entered on any one claim, all damages stemming from that claim must be fixed. Rule 54(b) establishes that final judgments may, at the court's discretion, be entered for some claims while the court retains jurisdiction over the others. However, for a claim to be the subject of a final judgment and certification under Rule 54(b), the requirements of *Burnett* and *Giesow* must be met with respect to that particular claim. In other words, the district court may utilize its Rule 54(b) powers with respect to a given claim only if all damages stemming from that claim have been fixed.

It is unclear from the record below whether the district court applied these rules properly in this case. If the judgment of July 12, 1974, allows ICC to prove further

damages for each and every of its claims against Vesco, then no Rule 54(b) certification can be entered for any of the claims since such certification and final judgment are permissible with respect to any one claim only if all damages stemming from that claim have been fixed. However, if the judgment of July 12, 1974, is to be understood as establishing all damages for some of the claims and allowing future proof of damages for the remaining claims only, then Rule 54(b) certification is proper with respect to those claims for which all damages have been proven.

In short, the judgment of July 12, 1974, is susceptible to two interpretations, one which is consistent with Rule 54 (b) certification, the other which is not. Accordingly, we remand for the entry of a new judgment to clarify for which, if any, of the claims against Vesco all damages have been computed. If the damage award of $2,422,466.72 entered on July 12, 1974, was intended to include all the damages from any of the claims against Vesco, those specific claims for which no further damages may be proven may be the subject of a final judgment and Rule 54(b) certification. However, the claims on which ICC is still free to prove additional damages may not be subject to a final judgment or Rule 54(b) certification.

III. Summary

In summary, we remand to the district court for an apportionment among the various claims raised by ICC of the damages assessed by the district court on July 12, 1974. For those claims for which further damages may not be proven, the district court may enter a final judgment and, if it chooses, provide for explicit Rule 54(b) certification. However, the district court must retain jurisdiction over the remaining claims for which ICC may prove additional damages. No final judgment may be entered with respect to any of those claims until all damages have been assessed.

In light of our decision to remand for the reasons stated above, it is unnecessary for us to reach the other arguments raised by the Company on appeal.

Remanded.

AMENDED JUDGMENT ENTERED MAY 27, 1976

A judgment having been entered herein against Robert L. Vesco on October 5, 1973;

AND, this cause having been brought on for partial inquest before the Court on May 14 and 22, 1974 and July 12, 1974, after the required notice was given to defendant Robert L. Vesco, and plaintiff having offered proof establishing damages in the amount of $2,188,354.93 with respect to the claims set forth in Count Two of the Complaint;

AND, it appearing, and the undersigned having expressly determined, that there is no just reason for delay in entering a final judgment against defendant Robert L. Vesco with respect to the claims set forth in the Second Count of the Complaint and so much of the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Counts as relate to claims arising out of (a) the dividend in kind of the outstanding shares of Fairfield General Corporation declared by International Controls Corp. in late 1970; (b) the purchase by Skyways Leasing Corporation of a Boeing 707 airplane in June of 1971 with funds contributed to Skyways Leasing Corporation by International Controls Corp.; (c) the lease between International Controls Corp. and Skyways Leasing Corporation relating to the Boeing 707 airplane and all payments made by International Controls Corp. thereunder and (d) all monies paid by International Controls Corp. in connection with defendant Robert L. Vesco's use of the Boeing 707 airplane; and the undersigned having hereby expressly directed the entry of final judgment with respect to said claims; it is

ORDERED, ADJUDGED AND DECREED that plaintiff recover of defendant Robert L. Vesco the sum of $2,188,-354.93 plus interest on said sum at the rate of 6% from March 1, 1973 or a total through July 12, 1974 of $2,422,-466.72 with respect to the claims asserted in the Second

Count of the Complaint and so much of the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Counts as relate to claims arising out of (a) the dividend in kind of the outstanding shares of Fairfield General Corporation declared by International Controls Corp. in late 1970; (b) the purchase by Skyways Leasing Corporation of a Boeing 707 airplane in June of 1971 with funds contributed to Skyways Leasing Corporation by International Controls Corp.; (c) the lease between International Controls Corp. and Skyways Leasing Corporation relating to the Boeing 707 airplane and all payments made by International Controls Corp. thereunder and (d) all monies paid by International Controls Corp. in connection with defendant Robert L. Vesco's use of the Boeing 707 airplane; and that the plaintiff have execution therefor; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff shall have a right to prove such additional loss, damage, cost and expense as it has suffered by reason of the claims alleged in the Complaint, other than those as to which judgment has been hereinabove granted, the amount of any such additional loss, damage, cost and expense to be determined by the Court upon an additional hearing or hearings to be held as provided for in said October 5, 1973 judgment; and it is further

ORDERED, that this judgment be and the same hereby is entered *nunc pro tunc* as of July 12, 1974.

/s/ Charles E. Stewart Jr.
U.S.D.J.

A TRUE COPY
RAYMOND F. BURGHARDT,
Clerk

Judgment Entered May 27, 1976
Raymond F. Burghardt,
Clerk

MEMORANDUM DECISION BY JUDGE CHARLES E. STEWART, FILED AUGUST 22, 1975

STEWART, DISTRICT JUDGE:

Plaintiff International Controls Corporation ("ICC") has moved for an order permitting it to satisfy some of its outstanding default judgments against Robert L. Vesco through certain assets of Vesco and Vesco & Co., Inc. ("Vesco & Co."). The assets are 846,380 shares of ICC stock held of record by Vesco & Co. and 122,463 shares held of record by Vesco. The major issue here is whether ICC is entitled to enforce those judgments against Vesco by proceeding against Vesco & Co.

Plaintiff argues that such action is proper because Vesco & Co. is the alter ego of Vesco and therefore should not enjoy corporate status immune from Vesco's personal liabilities. In addition, ICC argues that Vesco & Co. obtained the shares through transfers from Vesco which were fraudulent as against ICC and therefore voidable. On June 30, 1975, a hearing was held on these issues. We find that the corporate veil of Vesco & Co. should be pierced since it is the mere alter ego of Vesco and to sustain it would work an injustice and fraud upon plaintiff. In view of this finding, we need not reach the question posed by plaintiff of whether the assets were obtained through fraudulent transfers under the New York Debtor and Creditor Law.

There is a strong presumption of validity surrounding the corporate form which can only be overcome in unusual circumstances. *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975; *Zubik v. Zubik*, 384 F.2d 267 (3d Cir. 1967); *Chengelis v. Cenco Instruments Corp.*, 386 F. Supp. 862 (W.D. Pa. 1975). Generally, it is necessary to show that there

is fraud, misrepresentation or illegality involved in use of the corporate device before a court will disregard its limited liability. *See Anderson v. Abbott*, 321 U.S. 349, 362 (1944); *Lehigh Valley Industries Inc. v. Biren*, ° ° ° 30 F. Supp. 798 (S.D.N.Y. 1975).

> If any general rule can be laid down, in the present state of authority, it is that a corporation can be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.

Quinn v. Butz, 510 F.2d 743, 757-758 (D.C. Cir. 1975). In the instant case we have a number of factors concerning the establishment, ownership and operation of Vesco & Co. which, when taken together, lead us to conclude that Vesco & Co. is merely the alter ego of Vesco and that an injustice would result by maintaining the corporate fiction.

Vesco & Co., chartered as a Delaware corporation on July 12, 1972, was organized as a personal holding company for Vesco's shares of plaintiff ICC. Vesco was the president and a director of ICC at that time. The other officers and directors included Shirley Bailey, Vesco's personal secretary and Richard E. Clay, a close personal friend. At some time later, Vesco's wife took Vesco's place as president and a director of Vesco & Co. Around the time of incorporation, Vesco received 52 shares of Class A voting common stock and 1,838 shares of preferred stock in exchange for 350,000 shares of ICC. At the same time, Vesco exchanged 20,292 shares of ICC which he then held as custodian for his four children for 42 shares of Class A voting common stock and 12,000 shares of Class B non-

voting common stock of Vesco & Co., also to be held by Vesco in custody for his children. On December 29, 1972, Vesco transferred an additional 339,912 shares of ICC to Vesco & Co. and received 675 shares of Vesco & Co. preferred stock. Again, Vesco, as custodian for his children, exchanged an added 26,088 shares of ICC for 8,000 shares of Class B non-voting common stock of Vesco & Co. At a later time, Vesco's wife became custodian for all the children's shares. The shares of ICC stock held by Vesco & Co. are its sole substantial asset (Vesco's schedule 13D, Pl. Ex. 1).

In *Quinn v. Butz, supra*, the court, analyzing the judicial doctrine of piercing the corporate veil, examined the various circumstances in which it is used "not the least of which are those wherein the corporation is simply the alter ego of its owners." In speaking of a corporate alter ego, the court explained:

> we speak not merely of single ownership, or of the deliberate adoption and use of a corporate form in order to secure its legitimate advantages, but of such domination of a corporation as in reality to negate its separate personality. When at some innocent party's expense, the corporation is converted into such an instrumentality, 'the courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.'"

Quinn v. Butz, 510 F.2d at 758 (citations omitted).

While it is true that a corporation can be wholly owned by a single individual without losing corporate status, the "identity of interest" between Vesco and Vesco & Co., already acknowledged by the Court of Appeals, *ICC v.*

Vesco, 490 F.2d 1334, 1350 (2d Cir. 1974), can be sufficient when taken with other factors to find the two to be inseparable for purposes of liability. Vesco owned all of the preferred and 52% of the voting common stock of Vesco & Co. in his own behalf and 100% of the non-voting common stock of Vesco & Co. as custodian for his four children. At some point he transferred his interest in the company as well as the shares he held as custodian for his children to his wife. There is some evidence that the transfer date of July 21, 1972 which appears on the stubs of the certificates was fraudulently back-dated, since plaintiff's exhibit 13 indictes that Vesco himself did not receive some of those very shares until December 29, 1972. Such evidence can only lead us to conclude there was an improper motive in the transfer.

Plaintiff also showed evidence of Vesco's personal use of the corporation, a clear ground for ignoring the corporate form. *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975); *Quarles v. Fuqua Industries, Inc.*, 504 F.2d 1358, 1362 (10th Cir. 1974); *Dudley v. Smith*, 504 F.2d 979, 982 (5th Cir. 1974). Indeed among this evidence was a transaction where Vesco & Co. pledged its sole asset, all its shares of ICC stock, as security for a personal loan to Vesco. Although Vesco & Co. argues that Vesco's grant of an option to purchase all of his preferred stock at a substantial discount over market value in return for the guaranty was a good business proposition, we agree with plaintiff that considering the composition of Vesco & Co.'s Board of Directors, defendant's explanation is at least suspect.

The most important evidence bearing upon the relationship between Vesco and Vesco & Co., however, involves the purpose and circumstances surrounding the company's inception. Bad faith in the formation of a corporation justifies piercing the corporate veil. *Maley v. Carroll*, 381 F.2d (5th Cir. 1967); *Chengelis v. Cenco In-*

strument Corp., 386 F. Supp. 862 (W.D. Pa. 1975). The stated purpose for corporate ownership of the ICC shares was that it yielded "a more desirable business and administrative arrangement than direct ownership" and was "advantageous from an estate planning and administrative viewpoint" (Vesco's Schedule 13D, Pl. Ex. 1). The estate planning purpose behind the incorporation of Vesco & Co. is challenged by plaintiff. We agree with plaintiff that the circumstances surrounding the incorporation refute defendant's claimed estate planning purpose.

Vesco & Co. called Alan K. Bloom, formerly a member of the accounting firm, Coopers & Lybrand, as a witness at the hearing. He testified that he presented the idea of a personal holding company to Vesco as an estate planning device in 1967. Bloom stated that such a plan is effective when an individual anticipates a great increment in the value of his investment. It is this testimony which forms the basis for plaintiff's argument.

ICC argues that while the advice was valid as an estate planning technique in 1967 when the value of ICC shares was low and Vesco could anticipate a rapid and large increase in that value, it was no longer valid in 1972 when the plan was executed. While the shares did rise in the period after 1967, after the initiation by the Securities Exchange Commission ("SEC") of its investigation in 1971, the shares fell to their former low value where they remained at the time the plan was executed. Plaintiff argues that since there could no longer be any great expectation that the shares would again increase in value, the personal holding company was no longer valid as an estate planning device. Plaintiff reasons that Vesco, knowing the serious nature of the SEC investigation as detailed in the testimony of Harry L. Sears, an ICC director, was attempting to immunize his assets from his own potential liabilities.

While ordinarily a corporation is formed to limit personal liability, it is an improper use of the corporate device when formed to defraud creditors or even potential creditors. *See ICC v. Vesco*, 490 F.2d 1334, 1350 (2d Cir. 1974); *Plumbers & Fitters, Local 761 v. Matt J. Zuich Construction Co.*, 418 F.2d 1054 (9th Cir. 1969). *Cf.* New York Debtor & Creditor Law, §276 (McKinney's 1945). The doctrine of piercing the corporate veil "is designed to prevent a person from doing injury and then escaping responsibility by hiding behind a corporate shield." *Plumbers & Fitters, Local 761 v. Matt. J. Zuich Construction Co.*, 418 F.2d at 1058. Here, Vesco knew he was under investigation and "actually transferred his ICC common stock to Vesco & Co. at a time when he was actively engaged in his allegedly fraudulent scheme." *ICC v. Vesco*, 490 F.2d at 1350.

In addition to the fact that Vesco knew he was under investigation and made the transfer to Vesco & Co. during the time period covered by the detailed allegations of fraud in the complaint, Vesco made other transfers of property at the time. This apparent scheme to dispose of a wide variety of assets supports the conclusion that Vesco's intent with regard to the formation of Vesco & Co. was improper. These other transfers were stipulated to in substance at the hearing and need not be set forth here.

In light of all the above circumstances, we think that plaintiff ICC has demonstrated that the incorporation of Vesco & Co. was not for a valid corporate purpose, but rather was an attempt by Vesco to immunize his assets from liability while maintaining personal control over and use of those assets. In view of this finding, we find it desirable to appoint a receiver to collect those assets. Defendants Vesco and Vesco & Co. are directed to turn over all certificates of shares of ICC and Fairfield General

Corporation stock in their possession, custody or control, to the receiver within 20 days of such appointment, whether or not those certificates are within the United States. *United States v. Ross*, 302 F.2d 831 (2d Cir. 1962). However, we modify this order in accordance with *Ross*. Defendant Vesco, a non-resident of the United States, shall first "apply for such official consent to such transfer as may be required" in order "to provide against any possibility that any action ordered . . . will violate foreign law." 302 F.2d at 834.

Plaintiff has additionally requested that this court issue an order permitting ICC to cancel the stock held by Vesco and Vesco & Co. We defer decision on the right of ICC as judgment creditor to seek cancellation of stock held by Vesco and Vesco & Co. as judgment debtor until such time as it may become necessary to decide.

August 22, 1975

SO ORDERED.

/s/ Charles E. Stewart
CHARLES E. STEWART
U.S.D.J.

NOTICE OF CROSS-MOTION FOR REACCEPTANCE OF JURISDICTION OF THE ISSUES PRESENTED BEFORE THE SECOND CIRCUIT FILED AUGUST 31, 1976

SIRS:

PLEASE TAKE NOTICE that upon its Notice of Appeal dated July 7, 1976, filed in the District Court for the Southern District of New York on July 7, 1976, and upon the annexed affidavit of Susan I. Littman, Esq., sworn to on August 30, 1976, and upon the memorandum of law submitted herewith and oral argument before this Court, the undersigned, attorneys for defendant-appellant, Vesco & Co., Inc., will cross-move, pursuant to Federal Rule of Appellate Procedure 27(a) on September 14, 1976, at 10:30 A.M. at the Federal Court House, Foley Square, New York, New York, for an Order reaccepting jurisdiction of the issues presented before this Court on earlier appeal (Docket No. 75-7548), upon the ground that this Court should determine the issues raised on the original appeal as affected by subsequent proceedings below.

HANNOCH, WEISMAN,
STERN & BESSER,
Attorneys for
Defendant-Appellant,
Vesco & Co., Inc.

By: /s/ Albert G. Besser
ALBERT G. BESSER
A Member of the Firm

Dated: August 30, 1976

PROOF OF SERVICE

It is hereby certified that a copy of the within Notice of Cross-Motion of Defendant-Appellant, Vesco & Co., Inc., for Reconsideration of Issues Raised in Earlier Appeal, supporting affidavit of Susan I. Littman, and memorandum of law, were personally served upon the following on August 31, 1976:

SHEA, GOULD, CLIMENKO & KRAMER, ESQS.
Attorneys for Plaintiff-Appellee
330 Madison Avenue
New York, New York 10017

GORDON, HURWITZ, BUTOWSKY & BAKER, ESQS.
Special Counsel for Plaintiff-Appellee
299 Park Avenue
New York, New York 10017

ARUM, FRIEDMAN & KATZ, ESQS.
450 Park Avenue
New York, New York 10022

HANNOCK, WEISMAN, STERN & BESSER
Attorneys for
Defendant-Appellant
Vesco & Co., Inc.

By: /s/ Albert G. Besser
ALBERT G. BESSER
A Member of the Firm

Dated: August 31, 1976

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS BEFORE JUDGE CHARLES E. STEWART, DATED MAY 22, 1974

MR. ORLOFF: As I say, I read the Court of Appeals' opinion, in effect affirming your Honor, as saying that on the record then before the Court, we all acknowledge there was no evidentiary hearing. I think an evidentiary hearing will establish that Vesco & Co. is not the alter ego. Maybe that should be held first.

THE COURT: You ask for an adjournment.

What do you want to do during the adjourned period?

MR. ORLOFF: I want to prepare myself more fully to anticipate, combat, analyze and prepare a defense to the evidence that Mr. Carroll is putting in.

THE COURT: I understand that you may need time. Why don't we hear Mr. Corroll's evidence and if you need time, I will give it to you.

MR. ORLOFF: I think I have made enough statements, your Honor, to preserve our position on the record. It is not technical, believe me. I see our position as being one where if we are to defend on damages, we have got to do it now.

THE COURT: I take it your position is that (10) Vesco & Co., Inc. is not only technically separate from Robert L. Vesco, but in fact substantially in substance is different. Is that your point?

MR. ORLOFF: Yes, sir. I think it is a separate entity. I think a full hearing would show it was formed under conditions having nothing to do with what is alleged in this complaint.

THE COURT: I think there may be reasons to believe that you ought to have that full hearing. I would like to proceed this morning and I don't intend to require you to take positions today that you have not thought out and that you are not prepared to take because you have not developed a record.

It seems to me we ought to proceed this morning and certainly I will give you full opportunity to be heard.

I don't mean to suggest—I do mean to suggest, but I don't mean to reach any conclusion that by permitting you to participate at this stage that I have made up my mind in any respect as to the ultimate question of whether or not your client can be subjected to liability.

I would like to indicate, as I have already done, that I think your participation in this hearing may not help your position on that matter.

(11) MR. ORLOFF: Well, I will submit to your Honor now and at the appropriate time whether this becomes an issue that our participation or non-participation should not be legally relevant in any way, shape or form.

THE COURT: I think that is a question we can debate.

MR. ORLOFF: May I respectfully ask your Honor this: I take it your Honor is inclined to agree with the plaintiff's position, as I understand it, that if Vesco & Co. were not to appear here at this point, that there would not be a new damage hearing such we are now holding with respect to Vesco & Co.?

THE COURT: I don't know about that.

MR. CARROLL: Your Honor, let me just comment on that.

Mr. Orloff's entire position appears to be premised on the assumption that he has a right or Vesco & Co. has a right to participate in these damage hearings.

We are seeking a judgment here against Robert L. Vesco, not against Vesco & Co.

After we get a judgment, if we do get a judgment, in a liquidated amount, we will atempt to enforce that judg-

• • •

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS BEFORE JUDGE CHARLES E. STEWART, DATED JULY 12, 1974

(61) (Plaintiff's Exhibits Nos. 1 through 111 for identification were received in evidence.)

MR. ORLOFF: Your Honor, I should have an opportunity to put some evidence before the Court also, and I would most respectfully say that I should have the opportunity to put forth evidence, not only as to the dollar figure of any damage award, but also as to the liability issue.

I realize that the plaintiff has taken a contrary position in its memorandum, but, as we suggested to your Honor in our memorandum, both from the standpoint of Vesco & Co.'s potential vulnerability for any judgment against Robert Vesco, and by virtue of the fact that there has been a conspiracy alleged among a number of defendants, who have not had a chance to defend themselves as yet, on this issue, no judgment should be entered until that defense is put in.

THE COURT: I have these thoughts about it:

It seems to me that in terms of the dollars, Mr. Carroll has told us what they are, and my notion is that this is reasonably clear.

On the other hand, what you say about the merits concerns me. I think I am obligated to give you a hearing on the question of conspiracy and on the merits. I'd like (62) to do it promptly. What's your notion on it?

MR. ORLOFF: Within some reasonable time period, your Honor. I don't mean months, but I am talking certainly about several weeks. I would be ready on that.

I would say this to your Honor in terms of the numbers. I don't know what your Honor's inclinations are to whether you have formed an opinion as to the actual dollar amounts—

THE COURT: No, I have not formed a precise opinion. I had in mind that I was going to ask Mr. Carroll to submit an order which would deal with the figures.

Does that seem appropriate to you, Mr. Carroll?

MR. CARROLL: Yes, I am prepared to submit judgment.

THE COURT: I think you would submit the order, of course, to Mr. Orloff, but it does seem to me, Mr. Orloff, that on the figures, the dollars we don't have much to argue about.

On the merits, I think perhaps we do.

MR. ORLOFF: May I be heard on the figures for a moment?

It seem to me, your Honor, a substantial question has been raised in my examination of Mr. Ost, my cross-(63) examination, as to the manner in which receipts from IOS were allocated. And it is my understanding, and I don't mean to sum up at this point--I am sure your Honor will give me a chance to do it in another way—but it does seem to me a substantial question is raised as to whether or not ICC, through the direction of its officer, Mr. Beatty, at least, and this is Mr. Ost's testimony, did not reallocate, or allocate, if you will, in May of '73 that entire amount for the Boeing 707 account which changes the dollars sought here substantially. It changes it by almost a million dollars.

Now, I don't know what Mr. Beatty's testimony would be, but it strikes me that at least we ought to make an

effort to get him in to testify on this subject, because he would have something to say, obviously, as to this.

Obviously, if your Honor will accept the allocation made in that Telex, then I am content, and I don't want to get into that area any further. But I assume Mr. Carroll's position is that the Telex is meaningless, and it was attached to an affidavit filed with this Court, the numbers set forth were in the affidavit, and it was attached as an exhibit presumably to back up the number in the affidavit, and it seems to me either it's given credence or if it's now (64) going to be run away from, so to speak, I should certainly have the oportunity to try to bring in other witnesses to confirm that, in fact, that is the way the amount should be allocated, and we are talking about a million-dollar difference there.

MR. CARROLL: Your Honor, on that point, Mr. Ost has been perfectly clear here that the allocation was made initially on ICC's books and records as shown on the exhibits offered in this proceeding, and that the allocation as reflected in this Telex, that was an exhibit to his SEC affidavit, was done merely for the purpose of negotiations, it was not a reflection of ICC's books and records. He further testified the initial allocation was done according to the instructions of Mr. LeBlanc.

THE COURT: As I have indicated, I have a tentative view. I am going to hear Mr. Orloff, whatever you want to tell me, but it does seem to me that we have come pretty close to the end of fruitful discussion about figures.

Now, on the merits, that's something different.

MR. CARROLL: Your Honor, on the question of the merits, I don't think I understand exactly what Mr. Orloff is asking for and I dont' know that your Honor did.

(65) I believe Mr. Orloff was asking for a full hearing on the question of Mr. Vesco's liability under the complaint, and I think our memorandum of law shows that Mr. Vesco would not be entitled to that, were he here.

THE COURT: No, I don't understand Mr. Orloff to—well, if that's what he means, he is not going to get that kind of a hearing. I understood that what he was interested in was a hearing on the merits of whether or not the charges with respect to the airplane are appropriate.

Isn't that what you have in mind, or what is it that you have in mind?

MR. ORLOFF: Yes. I am not sure I frankly comprehend the distinction your Honor is now making between that and the merits. Maybe I can put it another way by referring back to the complaint in this case.

THE COURT: I am talking about the merits in this matter.

MR. ORLOFF: Yes, the merits of this matter.

THE COURT: Mr. Ost, you don't have to sit on the witness stand any longer. You are excused.

THE WITNESS: Thank you.

(Witness excused.)

MR. ORLOFF: The point I am making, your Honor, just to clarify it: There are eleven counts in the com-
(66) plaint in this case. The only count that seeks a liquidated sum with reference to the airplane, and it seeks essentially the same sum that Mr. Ost has testified to, is Count 10.

In Count 10—and damages are sought in that liquidated amount in Count 10—Count 10 seeks relief against IOS,

Kilmore Investments, Global Holdings and Global Financial, for failing and refusing to pay the balance due to ICC, and the amount is quite clearly—have to do with the amounts Mr. Ost has been testifying to.

Now, if those were the defendants against whom Mr. Carroll was seeking judgment, I wouldn't be here defending. As I understand it from his memorandum, what he is trying to show an other counts of the complaint is conspiracy has been charged in which various persons have somehow conspired in such a way that, among others, Robert Vesco—and we say that appears to follow from your Honor's temporary ruling, preliminary ruling, that that might include Vesco & Co.—as a result of that conspiracy, somehow Robert Vesco is personally liable for these charges which are admittedly IOS obligations, and it's in that area that I would want to defend on and put in proof on, because it seems to me it's long jump from (67) taking a book account between ICC and IOS and translating that into a personal obligation of Mr. Vesco—and let me repeat again, my only reason—

THE COURT: Have you got a copy of the complaint there?

MR. ORLOFF: Yes, sir. If your Honor doesn't mind, it's in the Second Circuit Appendix I have.

MR. CARROLL: I have the file copy, your Honor (handing).

THE COURT: Yes. Are you finished?

MR. ORLOFF: Well, I am saying it's a long jump from taking a book account obligation from IOS to ICC and translating that into a personal liability of Robert Vesco for that same amount of money, and that's in essence what they are trying to do here, and they are doing it on the theory of a conspiracy—

THE COURT: Well, what do you visualize, Mr. Orloff, that you would like to do? I don't mean—I don't want you to tell me in detail.

Are you going to put on witnesses? Are you going to have documents? What are you going to do?

MR. ORLOFF: My primary goal would be, but it may not be practical that I can convince your Honor, to convince your Honor that Vesco & Co. is separate and (68) independent, and if you were to enter a judgment against Robert Vesco, it shouldn't affect Vesco & Co., and if you did that, I could stop at that point.

The problem I have had, and I think I said that the first time I came in on that proceeding, is that I have the feeling that your Honor, at least tentatively, is inclined otherwise, and you are inclined to saddle Vescoe & Co. with any judgment entered against Robert Vesco.

THE COURT: You are correct.

MR. ORLOFF: While I disagree with it, I appreciate your Honor is indicating your inclination to rule that way.

THE COURT: I could be wrong about that, and perhaps you should have a chance to show me I am wrong.

MR. ORLOFF: I would like that chance.

Secondly, I think I should have the opportunity to show that, in fact, the whole notion, the whole factual theory that somehow would lead to the conclusion that Robert Vesco is liable for this money personally is simply incorrect, and it's incorrect, quite honestly, largely on the basis of documents that exist as a matter of public record.

THE COURT: Well, it's the second part of that (69) that bothers me. It seems to me I have dealt with that problem.

MR. ORLOFF: I don't know that your Honor has. For example, and I say this only by way of example, one of the underpinnings for their cause of action is that the lease between ICC and Skyways was never approved by the ICC board of directors. Yet Mr. Beatty filed an affidavit with this Court in the SEC case in which he—

THE COURT: I don't think whether it was approved or not approved makes much difference.

MR. CARROLL: It's not an issue here.

MR. ORLOFF: It makes a difference, as I read the complaint, in terms of whether there was some sort of a conspiracy that would cause Mr. Vesco to be personally liable.

THE COURT: I think the fact of that approval doesn't really—it seems to me that's a completely irrelevant problem.

MR. ORLOFF: The plaintiff doesn't seem to think so, your Honor, in its theory.

I mean, I would like to understand this theory. I don't know whether your Honor does. The theory makes Mr. Vesco liable where there were agreements in effect between IOS and ICC regarding reimbursement for this (70) airplane. You have got two corporate entities who enter into agreements and, in fact, as has been testified to, over some period of time, IOS reimbursed ICC.

Now, we have them coming in saying that Mr. Vesco is personally responsible for the balance.

MR. CARROLL: Your Honor, the theory is explained very well in your complaint, and a number of different theories.

Number one, the complaint alleges that the entire IOS transaction was a corporate waste perpetrated by Mr. Vesco on ICC and he is responsible for all monies expended in connection with it, that it was part of a fraud in violation of the '34 Act, and all these expenses flowed from that violation. And it's all set forth in our memorandum of law, the various provisions, the various paragraphs of the complaint.

I don't know what Mr. Orloff's concern as to whether Mr. Vesco is liable or not. Mr. Orloff does not represent Mr. Vesco. Mr. Orloff represents Vesco & Co. When the times comes that we attempt to enforce a judgment against Vesco & Co., that's the time for Mr. Orloff to come in for his hearing on the merits whether or not Vesco & Co. is in fact an alter ego of Mr. Vesco; not at this time.

(71) We are asking for a judgment against Mr. Vesco. Then, under the Huss case, liability is established.

THE COURT: That's not an entirely accurate statement, Mr. Carroll. The judgment you are looking for is also against Vesco & Co.

Do you want me to enter a judgment against Vesco & Co., Inc.?

MR. CARROLL: We are not asking for a judgment against Vesco & Co., Inc. All we are asking for is a judgment against Robert Vesco.

MR. ORLOFF: Will I have a full opportunity for a hearing on the merits?

THE COURT: I understand the chances of collecting from Vesco & Co., Inc., are better that collecting from Robert L. Vesco, but that's something you have to decide.

Mr. Orloff, what were you going to say?

MR. ORLOFF: I was going to ask of Mr. Carroll through the Court whether I am therefore assured, and I guess I must respectfully ask the Court, too, that if a judgment were to be entered against Robert L. Vesco alone, would Vesco & Co. have an opportunity at a later date to be heard fully on the merits?

THE COURT: I have just been told by Mr. Carroll he doesn't want a judgment against Vesco & Co., Inc.

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS BEFORE JUDGE CHARLES E. STEWART, DATED JULY 12, 1974

(71) We are asking for a judgment against Mr. Vesco. Then, under the Huss case, liability is established.

THE COURT: That's not an entirely accurate statement, Mr. Carroll. The judgment you are looking for is also against Vesco & Co.

Do you want me to enter a judgment against Vesco & Co., Inc.?

MR. CARROLL: We are not asking for a judgment against Vesco & Co., Inc. All we are asking for is a judgment against Robert Vesco.

MR. ORLOFF: Will I have a full opportunity for a hearing on the merits?

THE COURT: I understand the chances of collecting from Vesco & Co., Inc., are better that collecting from Robert L. Vesco, but that's something you have to decide.

Mr. Orloff, what were you going to say?

MR. ORLOFF: I was going to ask of Mr. Carroll through the Court whether I am therefore assured, and I guess I must respectfully ask the Court, too, that if a judgment were to be entered against Robert L. Vesco alone, would Vesco & Co. have an opportunity at a later date to be heard fully on the merits?

THE COURT: I have just been told by Mr. Carroll he doesn't want a judgment against Vesco & Co., Inc.

(72) MR. ORLOFF: I think he is going to come in for one later on, and I want to make sure I will get my full hearing.

THE COURT: Of course you will.

This is interesting. Now I wonder what we need to do, if anything, from here on?

MR. CARROLL: I don't think there is anything to do.

THE COURT: You send me an order, and, of course, Mr. Orloff gets a chance to look at it.

MR. ORLOFF: I thought Mr. Ost was going to send out this statement.

THE COURT: Oh, yes. Let's see, how did we leave that? We have been back and forth on that.

MR. CARROLL: Mr. Ost will send me figures, which I will have Monday or early next week, and I will transmit them to your Honor and Mr. Orloff.

THE COURT: It does seem to me that, although I am requiring this, that it's not going to mean very much.

I will expect to get from your, Mr. Carroll, an order in the course of the next three or four days, which will have been submitted to Mr. Orloff.

MR. ORLOFF: Would you be good enough to send it to me?

*EXCERPT FROM TRANSCRIPT OF PROCEEDINGS BEFORE JUDGE CHARLES E. STEWART DATED OCTOBER 2, 1974 IN INTERNATIONAL CONTROLS CORP. V. ROBERT VESCO (74 CIV. 1588)

(8) THE COURT: I would agree with that entirely. If there is no cause of action stated here, then nothing can be done to you.

MR. ORLOFF: As long as we have the opportunity to raise that at the appropriate time.

THE COURT: At the moment, Mr. Orloff, I don't know because I haven't been fully made aware of the pros and cons, whether or not a cause of action is stated. I happen to think a cause of action is stated, but I am open to argument on that.

But, in any event, if I am wrong on that, if no cause of action is stated and I think there is, your client is not going to get into trouble because there are other people in this courthouse who will straighten me out.

MR. ORLOFF: The problem I have at the moment, your Honor—

THE COURT: So that it seems to me the question you are raising is in all respects premature.

MR. ORLOFF: If my client, Vesco & Co., has the right to challenge the existence of the cause of action at some point in time, if that is what your (9) Honor means by premature, then I can see an accept your Honor's point. At the moment there is nobody raising that point. There is nobody pointing out to the court that there is no claim here really of corporate opportunity.

---

* This transcript is not included in the record on appeal in this case, but the excerpt is submitted by Appellant because it relates to an issue presented in this appeal and involves the same parties and the same Court.

THE COURT: Of course, the question will be presented to you if and when somebody comes after your client to try to get some of your assets, and then you will have full opportunity to litigate everything.

MR. ORLOFF: If that is the position, then I am satisfied.

THE COURT: Of course, that is not to be the case.

MR. ORLOFF: Your Honor, I certainly don't presume to take the court's time, particularly late in the day, to argue things that are academic. I suggest to your Honor the plaintiffs brief was ambiguous as to what position the plaintiff would take. I think your Honor's statement clears up that ambiguity.

THE COURT: Let me hear from Mr. Camhy.

MR. CAMHY: Your Honor, the complaint in this action asserts that one Robert Vesco, while a fiduciary of a corporation, appropriated to himself a

• • •

*EXCERPT FROM TRANSCRIPT OF PROCEEDINGS BEFORE JUDGE CHARLES E. STEWART DATED OCTOBER 2, 1974 IN INTERNATIONAL CONTROLS CORP. V ROBERT VESCO (74 CIV. 1588)

THE COURT: I don't know about that, Mr. Camhy. I would suppose that as a general proposition if a default judgment is entered and pursuant to that judgment proceedings are brought against somebody else, that that somebody else doesn't have the opportunity to raise the claim that no cause of action was stated. I am not sure of that. I would suppose it is possible that there might be a way to raise a claim that no cause of action was stated and that therefore you can't come after me. I don't think we have to worry about that at this point.

It seems to me that the situation we are in today, Mr. Orloff and Mr. Camhy, is this: I am fully aware of the problems which are involved in this matter. I know who Vesco is. I know what Vesco & Co. is.

Of course, you are not going to take the position that you are Vesco, which you aren't.

And, of course, if Mr. Camhy reaches the point where he thinks he can go after Vesco & Co., Inc. to satisfy a judgment against Vesco, you are going to have the fullest opportunity to make whatever presentation you want. The question of whether or not you can argue that there is a cause of action stated here, it seems to me, is one which you can then raise at that point. Mr. Camhy says he doesn't think you can. In any event, I don't think you are entitled to come into this cause of action, this lawsuit, at this point. I am going to deny your motion to intervene in light everything I have said.

All right, thank you, gentlemen.

---

* This transcript is not included in the record on appeal in this case, but the excerpt is submitted by Appellant because it relates to an issue presented in this appeal and involves the same parties and the same Court.

FILED
JAN 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-803

VESCO & CO., INC.,

Petitioner,

vs.

INTERNATIONAL CONTROLS CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR COMMON LAW WRIT OF CERTIORARI OR MANDAMUS

JESSE CLIMENKO
SHEA GOULD CLIMENKO & CASEY
Attorney for Respondent
330 Madison Avenue
New York, New York 10017
(212) 661-3200

SHELDON D. CAMHY
DANIEL L. CARROLL
On the Brief

TABLE OF CONTENTS

TABLE OF CASES

STATUTES, RULES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-803

VESCO & CO., INC.,

Petitioner,

vs.

INTERNATIONAL CONTROLS CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR COMMON LAW WRIT OF CERTIORARI OR MANDAMUS

Respondent, International Controls Corp. ("ICC"), respectfully prays that the petition for the issuance of a common law writ of certiorari or mandamus to review the order of the United States Court of Appeals for the Second Circuit, entered in this case on September 14, 1976 be denied.

Opinions Below

Petitioner Vesco & Co., Inc. ("Vesco & Co.") seeks, in effect, review of three orders: (a) the amended judgment of the United States District Court for the Southern District of New York dated May 26, 1976 (16a•); (b) an order of the United States Court of Appeals for the Second Circuit dated September 14, 1976 which granted ICC's motion to dismiss Vesco & Co's appeal from the May 26,

---

• Reference to Petitioner's Appendix.

1976 amended judgment upon the ground that it had not been timely taken (1a); and (c) a further order of the United States Court of Appeals for the Second Circuit, also dated September 14, 1976, which denied Vesco & Co.'s motion for reconsideration of issues raised on a prior appeal to that Court (2a).

Statement of the Case

Background

On June 7, 1973 ICC commenced an action in the United States District Court for the Southern District of New York ("ICC Action") against a total of thirty-two defendants (including Robert L. Vesco ["Vesco"] and Vesco & Co. Twenty-two of said defendants had also been named as defendants in an action commenced in the same court by the Securities and Exchange Commission on November 27, 1972. The United States Court of Appeals for the Second Circuit in a decision on a prior appeal (*International Controls Corp.* v. *Vesco*, 490 F.2d 1334 [2d Cir. 1974]), cert. den. 417 U.S. 932 (1974), noted that the complaint in the SEC action alleged:

> "a scheme of extraordinary magnitude, deviousness, and ingenuity in violation primarily of the anti-fraud provisions of the Securities and Exchange Act of 1934 . . . [and] charged that Robert Vesco masterminded and, with his cohorts, implemented a plan involving the manipulation of the assets and securities of a number of corporations controlled by Vesco including ICC", 490 F.2d at 1338-39.

The complaint in the ICC Action contained eleven counts and alleged violations of the Securities Exchange Act of 1934, principally Section 10(b) and Rule 10b-5, and charged Vesco with fraud, self-dealing, waste of corporate assets and breach of fiduciary duty.

At the time it instituted the action, ICC also moved for a preliminary injunction enjoining Vesco & Co. from transferring certain assets, including 846,380 shares of ICC stock it held of record. The District Court's order granting such relief was affirmed by the Court of Appeals in the decision referred to above and, as indicated, Vesco & Co.'s petition to this Court for a writ of certiorari was denied.

The Default Judgment Against Vesco

On October 5, 1973 a default judgment was entered against Vesco who, after being served on July 30, 1973, failed to appear to answer the complaint.*

In accordance with the October 5, 1973 judgment, a partial inquest was held which resulted in the entry on July 12, 1974 of a judgment against Vesco for $2,422,466.72. Although notice of said inquest was sent to Vesco he did not appear in connection therewith. Instead, Vesco & Co. appeared and argued for the first time that it should be given the right to defend the action on Vesco's behalf on the merits. This contention was rejected by Judge Stewart and the inquest proceeded, Vesco & Co. participating throughout.

Throughout its petition, Vesco & Co. erroneously claims that Judge Stewart reneged on a promise to give Vesco & Co. a full hearing on the merits of ICC's claim against Vesco. As demonstrated hereinafter the only assurances given by Judge Stewart was that Vesco & Co. would be given a full hearing on the question of whether it was the alter ego of Vesco, thus permitting ICC to proceed against the assets of Vesco & Co., i.e. the 846,380 shares of ICC stock transferred to it by Vesco, in order to satisfy its judgment against Vesco. ICC had, from the inception, taken the position that it would seek to enforce any judgment against Vesco in this manner.

---

* Vesco is presently residing in Costa Rica and has successfully resisted extradition attempts based upon outstanding indictments against him.

The Alter Ego Hearing

In response to ICC's motion for an order permitting it to so reach the assets of Vesco & Co., Judge Stewart promptly set down for a full hearing the issue of whether Vesco & Co. was merely an alter ego of Vesco. After holding such a hearing Judge Stewart entered a decision and order on August 22, 1975 (18a-24a) in which he upheld ICC's contentions and directed Vesco & Co. to deliver its ICC stock to a court appointed receiver. Vesco & Co. has, to date, failed to do this.

Vesco & Co.'s Appeal from the Alter Ego Determination

On May 13, 1976 the United States Court of Appeals for the Second Circuit rendered a decision on Vesco & Co.'s appeal from Judge Stewart's August 22, 1975 decision. (*International Controls Corp.* v. *Vesco,* 535 F.2d 742 (2d Cir. 1976)). In effect the court found that the default judgment entered on July 12, 1974 lacked the certification of finality required by Rule 54(b) of the Federal Rules of Civil Procedure and remanded the case to the district court with the instruction that the district court could enter a final judgment, with the appropriate Rule 54(b) certification, as to those claims for which further damages could not be proven but could not enter a final judgment as to those claims for which further damages could be proven* (535 F.2d at p. 749).

The Entry of the May 26, 1976 Amended Judgment

Immediately following the Court of Appeals' May 13, 1976 decision ICC moved before the district court for the

---

* Vesco & Co. raised for the first time on its appeal from the August 22, 1975 decision the question relating to the amended complaint filed by ICC in October of 1973. Although the Court of Appeals did not expressly refer to that issue in its May 13, 1976 decision, we respectfully suggest that said argument had to have been considered and rejected by the Court of Appeals for, if the judgment is, as urged by Vesco & Co., "void and ineffective" (Petition, p. 19) there was no need to have said judgment certified as to finality.

entry of an amended judgment, *nunc pro tunc,* containing the Rule 54(b) certification. After hearing Vesco & Co. in opposition to that application, Judge Stewart signed and entered the amended judgment (16a-17a).

Vesco & Co.'s Attempt to Appeal from the May 26, 1976 Amended Judgment

Following the entry of the May 26, 1976 amended judgment, in response to letters addressed to the Court of Appeals by the attorneys for both Vesco & Co. and ICC, the Clerk of the Court of Appeals advised the parties that the prior appeal "is no longer before this court". This was on June 23, 1976, five days prior to the time that Vesco & Co. was required to file a Notice of Appeal from the May 26, 1976 amended judgment.

Although it was advised, in effect, that it would have to initiate a new appeal, Vesco & Co. waited until July 7, 1976 before filing its Notice of Appeal. Since no order extending the time for filing an appeal had been entered, the Court of Appeals did not have jurisdiction over the appeal and, in response to ICC's motion, entered an order of dismissal on September 14, 1976. At the same time the court also denied Vesco & Co.'s motion for reconsideration of the issues raised on the prior appeal, obviously deciding not to enlarge the 14 day requirement contained in Rule 40 of the Federal Rules of Appellate Procedure. Vesco & Co.'s motion for reconsideration was not made for approximately three months after the Court's May 13, 1976 decision.

Vesco & Co. also moved in the District Court for an order enlarging its time to file the Notice of Appeal—upon the ground of excusable neglect—and also for an order vacating and reentering the May 26, 1976 amended judgment. Both motions were denied by Judge Stewart in a decision dated October 27, 1976 (R1a-R8a*).

---

* Reference is to Respondent's appendix.

Reasons for Denying Petition

Under Rule 30 of the Supreme Court Rules the issuance of an extraordinary writ under 28 U.S.C. § 1651(a) is a matter "of sound discretion sparingly exercised". We respectfully suggest that the instant case does not call for the issuance of such extraordinary relief. Stripped of its surplusage, the petition merely presents a situation where Vesco & Co., faced with the dismissal of its appeal from the District Court's May 26, 1976 amended judgment because it was not timely taken, was forced to make an untimely motion for reconsideration of issues presented on a prior appeal and now seek the intervention of this Court in light of the Court of Appeals' decision to deny such reconsideration.

I. There is no merit to Vesco & Co.'s protest that it has been treated unfairly.

Vesco & Co.'s entire argument—presented at pages 10-17 of its petition—that it has been treated unfairly is premised upon the assumption that it has a right to defend ICC's claim against Vesco on the merits and its erroneous argument that Judge Stewart reneged on an agreement to permit such a defense.

Vesco & Co.'s contention in this regard distills down to the argument that, as an entity against which ICC intended to enforce any judgment obtained against Vesco, it had the right to defend the ICC action on Vesco's behalf, thus relieving Vesco of the obligation of appearing and subjecting himself to all of the obvious consequences which would result from such an appearance. Contrary to its assertion that it sought this right "from the outset" (Petition, p. 10), Vesco & Co. first took this position in a memorandum submitted prior to the inquest held on May 22, 1974. Prior to that time, the emphasis was entirely upon whether Vesco & Co. would be permitted to present evidence as to whether Vesco & Co. was "a creature of Robert Vesco" and "from the outset" Vesco & Co. was given the opportunity to submit evidence in this regard (R9a).

Throughout its petition Vesco & Co. charges that Judge Stewart reneged on a promise of a full hearing on the merits of ICC's claim against Vesco. This simply is not so. A reading of even those portions of the transcripts included in petitioner's appendix demonstrate that the full hearing "on the merits" to which Judge Stewart was referring concerned only the alter ego questions (27a-28a, 32a-33a, 35a, 37a).

Vesco & Co. cites no authorities whatever in support of its contention that it should be permitted to defend ICC's action on Vesco's behalf. However, even though the Court of Appeals presumedly did not reach that issue on Vesco & Co.'s appeal from the August 22, 1975 order, it necessarily decided that question when it affirmed the District Court's denial of Vesco & Co.'s motion to intervene in yet another action commenced against Vesco by ICC and in which Vesco & Co. was not a named defendant. There, in seeking to intervene, Vesco & Co. advanced its essentially boot strap argument that, since it had been found for the purpose of preliminary injunction to be Vesco's alter ego, it should be entitled, as his alter ego, to intervene and defend on his behalf.

In its brief to the Court of Appeals Vesco & Co., on its prior appeal (as well as on its appeal in the other action referred to above), cited a number of suretyship cases in support of its argument that it should be entitled to defend this action on the merits for Vesco. There is, however, absolutely no basis for analogizing the instant case to the suretyship situation. Vesco & Co.'s position is quite different from that of a surety who would have an *in personam* liability on the underlying claim payable out of its *own* property irrespective of whether it was holding property of its principal. Vesco & Co. stands in no such position. As it relates to the present situation, Vesco & Co.'s only involvement is that of a holder of assets which belong

to Vesco which are subject to the claims of ICC as Vesco judgment creditor.

II. The issues raised but left undecided on Vesco & Co.'s prior appeal do not warrant the granting of the extraordinary relief requested herein.

1. The alleged defect in the form of judgment.

Vesco & Co. urges that the original default judgment and the May 26, 1976 amended judgment are "unclear, confusing and uncertain" on their face because it is "impossible to determine what matters and portions of the pleading have been disposed of and what remains for further proceedings" (Petition, p. 17). Of course, to the extent this argument relates to the amended judgment, it was not raised on Vesco & Co.'s prior appeal in that the amended judgment was entered in response to the Court of Appeals' remand on that prior appeal.

In addition, Vesco & Co.'s argument in this regard cannot be taken too seriously in view of the fact that it did not even deem it necessary to include the complaint and the amended complaint in its appendix. However, we note that Judge Stewart in his most recent decision expressly rejected Vesco & Co.'s contention, finding that "[a]ll the proceedings and ensuing judgments against Vesco have clearly and consistently been based on, and related back to, the original, not the amended, complaint" (R5a) and that the "judgment is 'comprehensible' on its face" (R8a).

Similarly Judge Stewart, contrary to Vesco & Co.'s argument that no determination has been made as to whether the amended complaint was properly served on Vesco (Petition, p. 17), expressly found that the amended complaint had not been properly served on Vesco (R7a).*

* At page 11 of its petition, Vesco & Co. also states that "[t]here has been no finding at any time that the amended complaint was properly served on Robert Vesco." Technically this is correct in that Judge Stewart made a contrary finding.

2. The Alleged effect of the Amended Complaint on the Complaint.

Arguing that "the original complaint is completely superseded" by the amended complaint, Vesco & Co. asserts that the "default judgments, based upon an abandoned complaint, is facially void and ineffective" (Petition, pp. 18-19). First, as previously noted, page 4 fn., supra, this argument was, by implication, rejected by the Court of Appeals on Vesco & Co.'s prior appeal. Second, it was expressly rejected by Judge Stewart in his October 27, 1976 decision. In doing so, Judge Stewart noted that Vesco & Co. participated in proceedings on the default judgment for a long period of time—over two years—before raising this technical objection (R5a).

3. Vesco & Co. claimed right to be heard on the merits of the ICC's claim against Vesco.

This contention has been answered above. See pp. 6-8, supra. As noted Vesco & Co. offers no authorities in support of its argument that that one holding assets of a judgment debtor has a right to question the merits of the judgment creditor's claims against the judgment debtor.

4. The Finality of the Judgment.

Here Vesco & Co. argues that there is a question as to the propriety of the entry of a final judgment against but one alleged coconspirator. However, the Court of Appeals necessarily rejected this argument when it remanded the prior appeal to the district court. There would have been no need to remand for a determination as to what claims had been finally determined if the Court thought that the entry of a final judgment violated the rule set down in *Frow* v. *DeLaVega*, 82 U.S. 552 (1872).

5. The Alter Ego Finding.

Suffice it to say on this point that the evidence submitted by ICC at the alter ego hearing was anything but "skimpy" (Petition, p. 20). In this regard, we respectfully refer the Court to Judge Stewart's August 22, 1976 decision which outlines some of this evidence (18a-24a).

6. The Propriety of Entering the Amended Judgment

Clearly, Vesco & Co. lost its right to question the propriety of the *nunc pro tunc* aspect of the amended judgment when it failed to prosecute its appeal from that judgment in a timely fashion.

In any event, it is, we respectfully suggest, clear that the entry of the amended judgment *nunc pro tunc* was entirely proper. The phrase "*nunc pro tunc*" is merely "descriptive of the inherent power of the court to make its record speak the truth—to record that which was actually done but omitted to be recorded." *A.B.C. Packard, Inc.* v. *General Motors Corporation*, 275 F.2d 63, 75 (9th Cir. 1960); *W. F. Sebel Co.* v. *Hessee*, 214 F.2d 459, 462 (10th Cir. 1954). In entering the amended judgment *nunc pro tunc*, Judge Stewart was merely confirming, in response to a question raised by the Court of Appeals, that the original July 12, 1974 judgment was final in certain respects and should have contained the Rule 54(b) certification.

Of course, it is obvious why Vesco & Co. would want the *nunc pro tunc* portion of the amended judgment stricken. Such a result might well negate all of ICC's efforts over the past two years in attempting to reach the assets of Vesco & Co.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the extraordinary writs sought should be denied.

Respectfully submitted

JESSE CLIMENKO
SHEA GOULD CLIMENKO & CASEY
Attorney for Respondent
330 Madison Avenue
New York, New York

SHELDON D. CAMHY
DANIEL L. CARROLL
On the Brief

APPENDIX

Memorandum Decision of the Honorable Charles E. Stewart, Jr., Filed October 27, 1976.

STEWART, DISTRICT JUDGE:

On May 27, 1976, an amended judgment was entered in this action in response to a May 13 remand from the Court of Appeals due to the absence of a Rule 54(b) of the Federal Rules of Civil Procedure ("F.R.Civ.P.") certification of finality in our July 16, 1974 judgment. Defendant Vesco & Co., Inc. ("Vesco & Co.") filed its notice of appeal from this amended judgment on July 7, 1976, nine days late. On August 4, 1976, plaintiff moved in the Court of Appeals to dismiss the appeal as untimely. Defendant then moved before this court on August 31, 1976 pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure ("F.R.App.P."), for an extension of the time in which to file a notice of appeal on the ground of excusable neglect. On September 14, the Court of Appeals heard plaintiff's motion to dismiss and a cross-motion by defendant that the May 13 remand be reconsidered. The motion to dismiss was granted and the motion to reconsider denied. On September 15, the defendant moved this court to vacate the May 27, 1976 judgment pursuant to Rule 60(b) of the F.R.Civ. P. A hearing was held on both of the motions pending before this court on September 22, 1976, and a further conference was held on October 7 after which the parties submitted additional papers.

Plaintiff, in opposition, initially argues that defendant's motion to extend the time in which to file a notice of appeal should be dismissed because the motion was not made within 60 days after entry of the judgment appealed from, as required by Rule 4(a). The Second Circuit, confronted with this very argument, recently held that

> "the filing of the notice of appeal within 60 days, coupled with a prima facie showing of excusable ne-

> glect, and the timely service of the notice of appeal on the opposing parties, constituted a sufficient manifestation on the part of appellants to permit the district court, in the exercise of its discretion, to treat the notice of appeal as the substantial equivalent of a motion to extend the time because of excusable neglect." *Stirling* v. *Chemical Bank*, 511 F.2d 1030 (2d Cir. 1975).

In the instant case, defendant filed, and served plaintiff with, its notice of appeal within 60 days of the judgment, and made a prima facie showing of excusable neglect. Thus we will exercise our discretion "to treat the notice of appeal as the substantial equivalent of a motion," and consider the substance of the motion.

First, defendant claims that it did not know that the judgment was entered on May 27, 1976. Defendant admits that its attorney saw the order signed on May 26 (Littman Affidavit ¶ 3). Defendant apparently thought that the prevailing party entered a judgment, and that this party mig' delay entry so as to put off "the inevitable" appeal (Littman ¶ 3). Defendant was entirely mistaken about the procedure in the federal courts where a signed order is sent directly from chambers to the clerk's office where it is entered in the docket shortly thereafter. See Rules 58(2) and 79(a) of the F.R.Civ.P. Ignorance of the court's procedures is not "excusable neglect." *Russo* v. *Flota Mercante Grancolombiana*, 303 F. Supp. 1404 (S.D.N.Y. 1969); *Nichols-Morris Corp.* v. *Morris*, 279 F.2d 81 (2d Cir. 1960).

Second, defendant claims that it was not notified by the clerk's office of the entry of judgment as required by F.R.Civ.P. 77(d). This is contradicted by the notation "m/n" in the docket following the entry of the judgment on May 27, 1976. This notation is used by the clerk's office to indicate that notice has been mailed to the parties (Camhy Affidavit ¶ 4). Even if notice were not mailed by

the clerk, Rule 77(d) specifically provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure," where the sole ground for relief is "excusable neglect." In this case, but for defendant's apparent ignorance of the federal procedures for entry of judgment, it would have known that entry would immediately follow signing of the order, and a routine check with the docket clerk would have informed it that this procedure had been followed. We also note that notice of the order appeared in the June 8, 1976 issue of the New York Law Journal. Thus, even if defendant did not receive notice from the clerk's office, it should have known independently that the order was entered, so any failure on the part of the clerk's office is not "excusable neglect." See *Nichols-Morris, supra* at 83.

Finally, on June 24, 1976, five days before the 30-day time to appeal had expired, defendant was informed by the Court of Appeals Clerk, Daniel Fusaro, that the amended judgment had been entered on May 27, 1976 *and* that the previous appeal had been disposed of by the Court of Appeals by its May 13, 1976 remand. Defendant did not file notice within this five-day period although it indicated that it intended at all times to pursue the appeal (Littman ¶ 11). Its only explanation for not filing is that it was "in a quandary . . . as to the proper avenue for further proceedings" (Defendant's August 30 Memorandum p. 5). However confusing the procedural posture of the case may have been earlier, we think that the Fusaro letter made it clear that defendant would have to institute a new appeal in order to have the Court of Appeals consider the other issues that defendant had raised, but which the Court of Appeals had not reached because of its decision to remand. Thus, we

must conclude that defendant's failure to act was the result "of one of those careless omissions to which everyone is indeed subject, but which do not excuse inaction." *Nichols-Morris, supra* at 83.

Accordingly, we deny defendant's motion to extend the time in which to file a notice of appeal.

In the alternative, defendant has moved on several grounds that the judgment be vacated pursuant to F.R.Civ.P. 60(b). Admittedly, defendant's primary interest in this relief is that it would give defendant a chance to pursue a timely appeal upon entry of a corrected judgment.

Defendant's main argument here rests on its contention that the May 27, 1976 judgment is void because it refers only to the original complaint, and not to the amended complaint which had been filed before the default against Robert L. Vesco ("Vesco") was entered.

A brief chronology of the key events relating to this claim is as follows. The original complaint was filed on June 7, 1973 and Vesco was served with summons and complaint on July 30, 1973. An amended complaint was filed on September 7, 1973 and service was purportedly made on Vesco on October 24 and 25, 1973. In the meantime, on October 5, 1973, a default judgment was entered against Vesco on the original complaint. Pursuant to this default judgment, an inquest on damages was held which resulted in our July 16, 1974 judgment awarding plaintiff $2,188,345.93. On April 4, 1975 an amended judgment was entered certifying the finality of the October 5, 1973 and July 16, 1974 judgments. The April 4 amended judgment was itself amended on September 15, 1975 in order to correct an error as to the date of the July 16, 1974 judgment. Plaintiff sought to satisfy some of its outstanding default judgments against Vesco through certain assets of Vesco & Co., and on August 22, 1975 this

court held that Vesco & Co. was the alter ego of Vesco. Vesco & Co. filed its notice of appeal on September 19, 1975 and on May 13, 1976, the Court of Appeals remanded to this court. Our May 27, 1976 judgment certified the finality of, and amended *nunc pro tunc,* the July 16, 1974 judgment.

All the proceedings and ensuing judgments against Vesco have clearly and consistently been based on, and related back to, the original, not the amended, complaint. Defendant apparently had no quarrel with this when it filed its brief on appeal to the Second Circuit since it attacked the default on the basis of the adequacy of service of the original summons and complaint, but never raised the point it now presses. There are in our view, therefore, substantial equitable considerations tending to suggest that defendant should not be permitted to raise for the first time at this very late hour, a procedural issue which could have been presented long ago. In any event, however, we find that defendant's contention is without merit.

The general rule is that once a pleading has been amended, and the amended pleading is complete in itself, it supersedes the original. See 3 Moore's *Federal Practice* § 15.08[7] at 939 (2d Ed. 1975); *Cicchetti* v. *Lucey,* 514 F. 2d 362 (1st Cir. 1975); *La Batt* v. *Twomey,* 513 F.2d 641 (7th Cir. 1975); *Phillips* v. *Murchison,* 194 F. Supp. 620 (S.D.N.Y. 1961). Defendant contends that the superseding effect takes place the moment the amended pleading is filed. While there is some language to this effect in some of the opinions upon which defendant relies (see *Cicchetti* and *Phillips, supra*) none of them were directly concerned with, or addressed, the issue raised by the facts of the instant case. Here the amended complaint was filed before the default judgment on the original complaint was entered, but service was not made, if at all, until after entry of the default judgment. Under these circumstances, plaintiff contends that the mere filing of the amended complaint

should not be held to have caused the original complaint to be superseded.

The relationship between filing and service of a complaint in the first instance is that filing properly commences the action, but

> . . . commencement is merely the threshold to litigation; unless it is ultimately followed by proper service of original process, or defendant waives proper service, the potential jurisdiction which commencement invokes never ripens into actual jurisdiction. 2 Moore's *Federal Practice* § 4.08 at 1024-5 (2d Ed. 1975).

We think that when an *amended* pleading is required to be served on a party, it similarly requires proper service in order to become effective as to this party. Thus, we conclude that if service is not, or cannot, be made of the amended pleading, it does not supersede the original. The question to be determined, therefore, is whether Vesco was properly served with the amended complaint.

Pursuant to Rule 4(i)(1)(E), service of the amended complaint was authorized by this court, on October 19, 1973, to be made as follows:

> (i) by any method of service of process authorized by Rule 4 of the Federal Rules of Civil Procedure; or (ii) as to individual defendants, by leaving a copy of the summons and amended complaint herein upon the premises of such defendant's last known residence located in Nassau, Bahamas and mailing a copy thereof to such defendant at either the Post Office Box of such defendant or to the address of such last known residence of such defendant in Nassau, Bahamas . . .

In light of representations recently made to this court by counsel for plaintiff as to what information was available about Vesco's whereabouts in October of 1973, the terms of

this order may not comport with the requirements of due process. See *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Milliken* v. *Meyer*, 311 U.S. 457 (1940).

However, we need not decide this since we find that the method of service outlined by James Bondi in his November 12, 1973 Affidavit of Service does not comply even with the terms of our order, in that Bondi was not able to "leave" the papers at Vesco's last known residence.

The affidavit recounted that two persons, who had been authorized to effect service, went to Nassau, Bahamas and there located the last known residence of Vesco (Bondi Affidavit ¶ 12). Two gardeners were present on the grounds of the residence, and they called a private security officer when the process servers identified themselves and stated their mission. After the security officer arrived, the process servers again identified themselves. The officer and gardeners both refused to accept the papers, and the officer took photographs of the process servers. At this point, one server threw the papers over the wall onto the grounds, but the gardeners handed them back to the officer who in turn threw them back into the process servers' car (Bondi Affidavit ¶¶ 13 and 14). While this attempt was thwarted by personnel on the grounds of this residence, there is no information that these persons were agents of Vesco, so the failure of the attempt cannot be imputed to Vesco's own efforts. Accordingly, we find that the amended complaint was not properly served and thus, that the amended complaint did not supersede the original, and that all the judgments properly relate to the original complaint.

Defendant's second ground for seeking to open the judgment is that the May 27, 1976 judgment "on its face, does not make sense" (Besser letter of September 15, 1976), if

its references to the various counts of the complaint are read as relating to the original complaint. We have carefully compared the counts of the complaint and those enumerated in the May 27, judgment, and we conclude that the references in the judgment are accurate. Thus we find that the judgment is "comprehensible" on its face.

Finally, defendant seeks to vacate the May 27 judgment on the ground that the reference to a judgment having been entered on July 12, instead of July 16, 1974, was incorrect. We think that this ground is not sufficiently substantive to merit our opening the judgment especially in view of the entire context of this motion.

Accordingly, we deny defendant's motion to vacate the judgment under Rule 60(b), as well as defendant's motion for leave to extend the time in which to file a notice of appeal.

So ordered.

s/s Charles E. Stewart Jr.
United States District Judge

Dated: New York, N. Y.
October 27, 1976.

Excerpts From Transcript of Proceeding Before The Honorable Charle E. Stewart, Jr., Dated July 9, 1973.

The Court: What specifically would you like me to do?

Mr. Orloff: Specifically what I would like your Honor to do in the first instance is to reconsider and vacate those findings and conclusions as your own.

The Court: As against Vesco & Co., Inc.?

Mr. Orloff: Yes, I am only speaking for Vesco & Co.

The Court: Let me interrupt you for a moment, Mr. Orloff.

We didn't have an evidentiary hearing, as you well know. I concluded, on the basis of material which is before me, material which you didn't have an opportunity to deal with, at least not fully, that Vesco & Co., Inc., was at least for purposes of temporary relief a creature of Robert Vesco.

Now, if you want an opportunity to present evidence on that question, I think I would be inclined to give you the opportunity to do so. My inclination I will not state, I will give you the opportunity to do so.